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In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF WYOMING, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

BRIEF FOR THE UNITED STATES

WILLIAM C. BRYSON
Acting Solicitor General
DONALD A. CARR
Acting Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General
EDWARD J. SHAWAKER
ROBERT L. KLARQUIST
JAMES J. CLEAR
MICHAEL J. MALMQUIST
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

The State of Wyoming initiated a general stream adjudication in its state courts to determine the nature, extent and relative priority of Indian water rights in the Big Horn River System. The Wyoming courts held that when the United States withdrew the Wind River Indian Reservation from the public domain, it reserved a water right for the benefit of the Reservation's Indian occupants to meet their future agricultural needs. The question presented is whether the Wyoming courts erred in measuring that water right based on the Reservation's "practicably irrigable acreage."

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-309

STATE OF WYOMING, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Wyoming Supreme Court (Pet. App. 1a-119a) is reported at 753 P.2d 76. The district court's amended judgment and decree (Pet. App. 168a-184a), order ruling on motions to alter or amend the decision (Pet. App. 185a-201a), and decision (Pet. App. 202a-279a) are unreported. The special master's report (Pet. App. 367a-717a) and supplemental and final report (Pet. App. 280a-366a) are also unreported.

JURISDICTION

The Wyoming Supreme Court entered its decision on February 24, 1988 (Pet. App. 1a), and it denied petitions for rehearing on April 22, 1988 (Pet. App. 120a). On July 7, 1988, Justice White granted Wyoming's motion for an extension of time, to and including August 20, 1988, in which to file a petition for a writ of certiorari, and Wyoming filed its petition on August 18, 1988. On January 23, 1989, the Court granted the petition for a writ of certiorari limited to Question 2 presented

in the petition. The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

TREATY INVOLVED

The Second Treaty of Fort Bridger, July 3, 1868, 15 Stat. 673, is set out at Pet. App. 793a-803a.

STATEMENT

The Wind River Indian Reservation is the home of the Shoshone and Northern Arapaho Tribes. The Reservation was established through the Second Treaty of Fort Bridger, July 3, 1868, 15 Stat. 673, and was located by mutual consent of the United States and the Shoshone Tribe in the Wyoming Territory, within the present boundaries of the State of Wyoming. It presently consists of approximately 2.5 million acres of varied terrain within the upper reaches of the Big Horn River. Pet. App. 7a-8a, 205a-206a, 533a. In 1977, the State of Wyoming decided to test whether the United States' creation of the Reservation included a federally reserved water right, and it therefore initiated a general stream adjudication in Wyoming District Court to determine the nature, extent, and relative priority of water rights, including Indian water rights, in the Big Horn River System. Pet. App. 11a-12a, 203a-204a. See Wyo. Stat. § 1-37-106 (1977) (Pet. App. 726a-728a). The district court appointed a special master to take evidence, prepare a report, and recommend a decree addressing the Tribes' entitlement. *Id.* at 12a-13a, 204a.

After a lengthy trial, the special master prepared a report (Pet. App. 367a-708a) recommending that the Tribes were entitled to a federally reserved water right of 477,292 acre-feet per year based on agricultural use of the Reservation (*id.* at 693-695a) and a much smaller reserved right based on non-agricultural uses. The district court adopted most of the special master's recommendations and awarded the Tribes 479,427 acre-feet per year based strictly on agricultural use (*id.* at 169a-182a). The Wyoming Supreme Court affirmed most of the district court's rulings and awarded the Tribes 500,717 acre-feet

per year based strictly on agricultural use (*id.* at 53a-72a). In each instance, the Wyoming courts determined the Tribes' reserved water rights for agricultural use through the application of the "practicably irrigable acreage" (PIA) standard—the same standard that this Court employed in *Arizona* v. *California*, 373 U.S. 546, 600-601 (1963) (*Arizona I*). Wyoming, which initially argued that if a reserved water right exists, it should be quantified through the PIA standard, now thinks that this was a mistake.[1]

A. The Creation of the Wind River Indian Reservation

This Court's past decisions describe the creation of the Wind River Indian Reservation. See *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 335 (1945); *United States* v. *Shoshone Tribe of Indians*, 304 U.S. 111 (1938); *Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476 (1937); see also *Northwestern Bands of Shoshone Indians* v. *United States*, 95 Ct. Cl. 642 (1942); *Shoshone Tribe of Indians of the Wind River Reservation* v. *United States*, 85 Ct. Cl. 331 (1937). The Shoshone Tribe originated as a peaceful nomadic people that hunted game and gathered food throughout an 80 million acre territory that now comprises the States of Colorado, Idaho, Nevada, Utah, and Wyoming. *Northwestern Bands*, 324 U.S. at 340 & n.5. The California gold rush and the Mormon migration brought travelers and settlers to this territory, which led to the depletion of game and resulted in inevitable conflicts. *Id.* at 341. The United States therefore negotiated a series of treaties with the various bands of Shoshone, including the Treaty of Fort Bridger, July 2, 1863, 18 Stat. 685. That treaty established peaceful relations and acknowledged that the Eastern Shoshone claimed the right to occupy a 44 million acre territory that now comprises portions of Colorado, Idaho, Utah and Wyoming.

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[1] We limit our discussion here to the tribal history and the proceedings below that are relevant to the question presented. The briefs in opposition filed by the United States and the Tribes provide additional information concerning the Wind River Indian Reservation and the course of this litigation. See U.S. Br. in Opp. 2-10; Shoshone Br. 1-7.

Shoshone Tribe, 324 U.S. at 341-345; *Shoshone Tribe*, 304 U.S. at 113; *Shoshone Tribe*, 299 U.S. at 485. See Pet. App. 9a, 206a-207a.

As the Wyoming courts explained (Pet. App. 9a, 207a), the close of the Civil War led to an increase in western migration, and the United States found it necessary to negotiate a new treaty that would restrict the Shoshones to a diminished area. The Shoshone Tribe's able chief, Washakie, agreed to cede the Eastern Shoshones' claim of right to occupy 44 million acres in exchange for exclusive occupancy of a far smaller reservation in the Wind River region. *Shoshone Tribe*, 304 U.S. at 113; *Shoshone Tribe*, 299 U.S. at 485; *Shoshone Tribe*, 85 Ct. Cl. at 345. The United States agreed to this exchange—fully recognizing that the Wind River region, which contained "fertile river valleys conveniently irrigable" (*Shoshone Tribe*, 304 U.S. at 114), was "the choicest and best watered portion" of the territory (*ibid.*). See *Shoshone Tribe*, 85 Ct. Cl. at 345-346. The United States and the Shoshone Tribe confirmed this agreement through the Second Treaty of Fort Bridger, July 3, 1868, 15 Stat. 673 (Pet. App. 793a-803a), which set apart the 3,054,182 acre Wind River Indian Reservation "for the absolute and undisturbed use and occupation of the Shoshonee Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them" (Art. II, 15 Stat. 674; Pet. App. 795a). See *Shoshone Tribe*, 304 U.S. at 113.[2]

In spite of the Shoshones' objections, the United States relocated the Northern Arapaho Tribe to the Wind River Indian Reservation in 1878. See *Shoshone Tribe*, 304 U.S. at 114-115;

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[2] The Shoshone-Bannock Tribes were also parties to this treaty; however, they exercised their option under Article II (15 Stat. 674) to select a separate homeland and relocated to the Fort Hall Reservation in what is now the State of Idaho. The water rights of those Tribes, which have a somewhat different historical basis, are not at issue in the instant litigation, but rather will likely be decided in the general adjudication of the Snake River Basin. See *In re the General Adjudication of Rights to the Use of Water from the Snake River Basin Water System*, Civ. No. 39576 (5th Dist. Twin Falls), aff'd, 764 P.2d 78 (Idaho 1988), cert. denied, No. 88-1170 (Apr. 3, 1989).

Shoshone Tribe, 299 U.S. at 486-490. From 1872 to 1934, the Tribes ceded or sold various Reservation acreage, and thereafter they reacquired some of the land. Pet. App. 9a-11a, 207a, 409a-431a. In 1890, some 22 years after the United States' creation of the Wind River Reservation, the State of Wyoming came into being (Act of July 10, 1890, ch. 664, 26 Stat. 222).

B. The Present Dispute

In this phase of the Big Horn River general stream adjudication, Wyoming primarily contested whether the United States, through its creation of the Wind River Reservation, had reserved water rights for the Tribes (Pet. App. 205a, 210-211, 404a-405a, 431a). The Wyoming courts uniformly held that the Second Treaty of Fort Bridger did reserve such rights in order to meet the Indians' future agricultural requirements. See *id.* at 19a-32a, 169a-173a, 211a, 431a-439a. This Court has declined to review that determination and has restricted its review to whether the Wyoming Supreme Court, the district court, and the special master were justified in employing the PIA standard to measure the amount of water that the United States has reserved through the 1868 treaty for the Tribes' projected agricultural needs.

The United States participated in the proceedings below as trustee for the Tribes.[3] It urged that the Second Treaty of Fort Bridger established the Wind River Reservation to provide a permanent Indian homeland and that the Tribes' federally reserved water right should be quantified based on the activities associated with such a homeland, including agriculture, livestock, fisheries and wildlife, mineral development, municipal and industrial uses, and aesthetics. Pet. App. 439a-440a. The United States further submitted that the agricultural portion of this reserved right should be determined, as in *Arizona I*, 373 U.S. at 600-601, through application of the "practicably irrigable acreage" standard. Pet. App. 454a.

[3] The claims filed by the United States on its own behalf were subject to adjudication in other phases of this litigation.

Applying these principles, the United States submitted that the Tribes were entitled to an award of 640,000 acre-feet per year, including 570,304 acre-feet per year of reserved water based on present and future agricultural need. See *id.* at 446a-457a. The Tribes, which participated in the judicial proceedings through retained counsel, basically agreed with the United States' general approach (*id.* at 441a), but they applied the principles differently, resulting in a larger claim (*id.* at 457a-462a).

Wyoming argued, in contrast, that the Wind River Reservation was created solely "to convert the Indians from a nomadic life to an agricultural one" (Pet. App. 440a), and that a reserved water right (if it existed) should be quantified "for domestic, agricultural, and stock watering uses only" (*ibid.*). Wyoming further indicated in the proceedings before the special master that this quantification should be conducted through the use of the PIA standard,[4] and it agreed with the United States and the Tribes that "practicably irrigable acreage" refers to " 'those acres susceptible to sustained irrigation at reasonable costs' " (*id.* at 534). Based on this standard, Wyoming affirmatively asserted that the Tribes were entitled to 323,176 acre-feet per year for present and future agricultural projects. See State of Wyoming's Response to the United States' Statement of Claims App. A at 2 (July 16, 1980).

The special master agreed with the United States and the Tribes that the United States established the Wind River Reservation to create a permanent homeland and that the Tribes' reserved water right should be determined on that basis. See Pet. App. 442a-443a, 643a. With respect to the single most im-

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[4] See State of Wyoming's Response to the United States' Statement of Claims 12 (July 16, 1980) ("Wyoming admits that, if a reserved water right was created on behalf of the Wind River Indian Reservation, it was created solely to provide the Indians living thereon with a supply of water for domestic uses, *for the irrigation of all practicably irrigable land on said Reservation*, and for stockwatering uses.") (emphasis added); State's Proposed Master's Report, Vol. 1, pt. 1, at 34 (Apr. 9, 1982) ("it is Wyoming's contention that the right may be quantified solely as is necessary to irrigate the *practicably irrigable acres* of the unalloted lands continuously held in trust by the United States within the Reservation") (emphasis added).

portant type of use—agriculture—he employed the PIA standard, as defined by the parties, to determine an award for "historic acres" (which are or have been successfully put to use as irrigated farmland) and for "future lands" (which have not been, but could be, successfully put to use as irrigated farmland). See *id.* at 463a-591a, 643-682a. He recommended a total agricultural award of 477,292 acre-feet per year representing 288,355 acre-feet needed to irrigate 54,389 acres of historically-irrigated Indian lands plus an additional 188,937 acre-feet needed to irrigate 48,520 acres of cropland in the "future projects" areas (*id.* at 695a). The special master also recommended recognition of additional, but far smaller, reserved water rights based on non-agricultural needs (*id.* at 696a-702a).

The United States, the Tribes, Wyoming, and some of the private parties filed exceptions with the district court. Wyoming again requested that if a reserved water right existed, it should be limited to the amount necessary to irrigate the Reservation's practicably irrigable acreage.[5] It also advanced, however, an inconsistent statement that the Indian's minimal needs were completely satisfied by their historic usage, which Wyoming estimated would provide each Indian with enough water to irrigate 12 acres of land. See State of Wyoming's Objections to Special Master's Report, Vol. 2 at 15:1 (Mar. 18, 1983).

The district court accepted most of the special master's recommendations (Pet. App. 121a-131a, 168a-279a). It concluded, however, that the United States had established the Wind River Reservation primarily to encourage the Indians to pursue an agrarian existence, and it therefore rejected the part of the master's proposed award based on non-agricultural needs (*id.* at 182a, 216a-222a, 262a-263a). Instead, the court held that the PIA standard provided the *sole* basis for quantifying the

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[5] Wyoming argued that application of the practicably irrigable acreage standard provided the Tribes with sufficient water to meet their minimal needs and "urge[d] the court to reject all amounts recommended by the Master in excess of that required to service what was proven to be PIA." See Wyoming's Brief in Support of Motion for Action Upon the Special Master's Report, Vol. 1, at 24, 26-27 (Mar. 18, 1983).

Reservation's reserved water rights (*id.* at 262a-263a). The district court made several adjustments to the special master's quantification and awarded the Tribes a total reserved water right of 479,427 acre-feet per year, measured by the Tribes' historic and future agricultural needs. See *id.* at 169a-182a.

The Wyoming Supreme Court largely affirmed the district court's decision. Pet. App. 1a-119a. That court, like the district court and the special master, rejected Wyoming's challenge to the existence of a reserved water right (*id.* at A19a-A43a). It specifically held that "[t]he district court was correct in quantifying the Tribes' reserved water right by the amount of water necessary to irrigate all of the reservation's practicably irrigable acreage" (*id.* at 47a). The Wyoming Supreme Court then examined the specific quantification in this case and made a number of minor adjustments that had the effect of confirming a federal reserved water right of 500,717 acre-feet per year, based on 108,221 acres of practicably irrigable land. This award represented 290,490 acre-feet based upon the historic use of 54,216 practicably irrigable acres, and an additional 210,227 acre-feet based on 54,005 acres of future project lands found to be practicably irrigable.[6]

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has long held that when the federal government withdraws its land from the public domain and reserves it for a federal purpose, including the establishment of Indian reservations, the government, by implication, reserves appurtenant water to the extent needed to accomplish the purpose of the reservation. See, *e.g.*, *United States* v. *New Mexico*, 438 U.S.

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[6] Justice Thomas, joined in part by District Judge Hanscum, dissented. The relevant portion of their dissent stated that the Tribes' reserved water right should be quantified based on the permanent homeland concept to include both agricultural and non-agricultural uses. See Pet. App. 83a-84a. They would not have included, however, the future project lands in the agricultural quantification because those lands, in their view, "may be irrigable academically, but not as a matter of practicality" (*id.* at 84a).

696, 698 (1978); *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976); *Winters* v. *United States*, 207 U.S. 564, 577 (1908). The Court has further held that when the United States has established an Indian reservation to enable the Indians to adopt an agrarian rather than nomadic economy, the federally reserved water right should be quantified based on the amount of water needed to cultivate the reservation's practically irrigable acreage. See *Arizona* v. *California*, 373 U.S. 600-601 (1963) (*Arizona I*). Those principles control this case.

There is no longer any dispute that when the United States set aside the Wind River Indian Reservation, it implicitly reserved a water right for its Indian occupants. Furthermore, Wyoming itself has consistently asserted—and the lower courts have concluded—that the United States' primary purpose in establishing the Wind River Reservation was to provide an agrarian livelihood for its occupants. Nevertheless, Wyoming contends that the United States did not intend to provide the Tribes with sufficient water to cultivate their practicably irrigable lands. Instead, Wyoming repeatedly urges, the Indians are entitled to only so much water as necessary to assure that their existence is "not entirely defeated" (Pet. 11, 28, 32, 47). Wyoming's position is incorrect—not merely because it is harsh and unworkable, but because it is fundamentally inconsistent with *Arizona I*, the law governing federal reserved water rights, and the need for certainty and stability in western water law.

a. In *Arizona I*, this Court held that, where a group of Indian reservations had been established to transform nomadic Indians into self-sustaining farmers, "the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage" (373 U.S. at 601). This case cannot be distinguished in any relevant respect from *Arizona I*. Here, as in that case, the Indians' agricultural lands were set aside with the understanding that the Indians would have to irrigate them to make them productive, that they would necessarily need to increase the cultivation of those lands over time to satisfy their future needs, and that the future Indian population could not be predicted with any degree of certainty. Here, as in

Arizona I, these three considerations indicate that the only "feasible and fair" measure of the Indians' water right is practicably irrigable acreage.

b. Implicitly recognizing that *Arizona I* and this case are indistinguishable, Wyoming argues that *Arizona I*'s quantification method should be modified (to make it generally inapplicable), "discarded," or "replaced" (Wyo. Br. 21, 28, 47). Wyoming contends that *Arizona I*'s method is inconsistent with historical quantification practices, that it fails to take into account various equitable considerations, and that it presents inherent problems of proof. Each of these assertions is incorrect. First, the practice of measuring Indian water rights based on irrigable land is as old as the *Winters* doctrine itself. Second, this Court has repeatedly held that reserved water rights are questions of implied intent rather than equity; moreover, Wyoming's equitable arguments here are unpersuasive. Third, the practicably irrigable acreage standard is desirable precisely because it rests solidly on objective evidentiary criteria rather than intractable "equitable" considerations. More fundamentally, while Wyoming and its amici urge that the *Arizona I* standard should be "discarded" and "replaced," they are unable to agree upon or even articulate a workable alternative.

c. Quite apart from the legal and logical force of the *Arizona I* standard, there is a central practical consideration that convincingly counsels in favor of its retention: the compelling need for certainty in western water law. First, there is the need for certainty with respect to the final resolution of this litigation, which has consumed 12 years and substantial resources for all concerned. If this Court were to "discard" *Arizona I*'s quantification standard, this litigation would have been for naught, and the process would begin anew. Second, there is a need for certainty with respect to Indian water rights adjudications generally. As a result of the lower courts' universal adherence to *Arizona I* for more than 25 years, the practicably irrigable acreage standard has generated substantial reliance. If that standard were "discarded," ongoing litigation

and settlement negotiations would be derailed, impeding the orderly and efficient resolution of numerous disputes. Finally, there is a need for certainty and continuity in reserved water rights theory and practice. The *Arizona I* standard is firmly grounded in nearly a century of water law; the various alternatives Wyoming and its amici propose would produce a clear break with past law and would replace certainty and stability with disorder.

ARGUMENT

THE WYOMING SUPREME COURT CORRECTLY RULED THAT WHEN THE UNITED STATES RESERVED WATER FOR THE WIND RIVER INDIAN RESERVATION'S FUTURE AGRICULTURAL NEEDS, IT RESERVED SUFFICIENT WATER TO CULTIVATE THE RESERVATION'S PRACTICABLY IRRIGABLE LANDS

The Wyoming Supreme Court has decisively resolved Wyoming's challenge to the Wind River Indian Reservation's reserved water rights in three unexceptional steps. First, the court recognized that the United States' creation of the Wind River Indian Reservation carried with it sufficient water to accomplish the purposes of the reservation (Pet. App. 26a, 32a-33a). See *United States* v. *New Mexico*, 438 U.S. 696, 699-700 (1978); *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976); *Arizona* v. *California*, 373 U.S. 546, 600 (1963) (*Arizona I*); *United States* v. *Powers*, 305 U.S. 527, 533, (1939); *Winters* v. *United States*, 207 U.S. 564, 575-577 (1908). Next, it held, as Wyoming itself had urged (see page, 6, *supra*), that the Reservation's primary purpose was to transform a nomadic people that wandered over a vast territory into a self-sufficient agrarian community that would cultivate irrigated lands (Pet. App. 33a-41a). See *Shoshone Tribe*, 304 U.S. at 118. The court then ruled that since the United States had created the reserved water right to meet the Tribes' future agricultural requirements, the Tribes' right should be measured by the amount of water necessary to cultivate the Reservation's "practicably irrigable acreage" (Pet. App. 47a). See *Arizona I*, 373 U.S. at 600-601.

This Court has declined to review the Wyoming Supreme Court's first two steps. Thus, we may take it as given that the United States reserved a water right to meet the Wind River Indian Reservation's future agricultural needs. The only remaining question is how to measure that right. We submit that this Court correctly resolved that issue in *Arizona I*. As a general matter, when the United States has established Indian reservations to transform nomadic people into farmers and has reserved associated water rights to provide for their future agricultural requirements, "the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage." 373 U.S. at 601. This case, which is indistinguishable in all relevant aspects from *Arizona I*, provides no occasion for creating an exception to the general rule. Wyoming's alternative approach—which would provide the Tribes with water only if, absent the water, their existence would be "entirely defeated" (Wyo. Br. 11, 28, 32, 47)—is unabashedly designed to extinguish the Tribes' reserved rights. It has no grounding in reserved water rights principles, would lead to gross inequities, and is ultimately unworkable. We begin by describing the practicably irrigable acreage (PIA) standard and why it is applicable here. We then turn to the legal and logical deficiencies of Wyoming's contention.

A. The Wyoming Supreme Court Correctly Followed This Court's Decision In *Arizona I*

This Court has recognized for more than 80 years that when the United States withdraws federal land from the public domain, it may implicitly include a reserved water right, vesting on the day of the withdrawal, to unappropriated waters. *Winters* v. *United States*, 207 U.S. at 576-577. See *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899).[7] In recognizing an implied right, the Court most assuredly does not, as Wyoming suggests, "repair oversights by Congress and the

[7] See also, *e.g.*, *New Mexico*, 438 U.S. at 698 (recognizing a reserved water right for a national forest); *Cappaert*, 426 U.S. at 143-146 (recognizing a reserved water right for a national monument).

President" (Wyo. Br. 17). Instead, it performs the familiar judicial task of interpreting treaties, statutes, and executive orders based on their express terms and reasonable implications.

In the case of Indian reservations created by treaty, the existence or non-existence of the reserved water right generally "turns on the agreement" between the parties. *Winters*, 207 U.S. at 575; see also *United States* v. *Walker River Irrigation Dist.*, 104 F.2d 334, 336 (9th Cir. 1939). And just as the agreement determines the existence of the right, it is likewise the basic source for determining how to quantify that right. Cf. *Arizona* v. *California*, 460 U.S. 605, 616 (1983) (*Arizona II*); *Arizona I*, 373 U.S. at 597. The PIA standard rests on the reasonable inference, applicable to most Indian treaties, that when the United States establishes an Indian reservation for future agricultural use, the amount of agricultural land set aside corresponds to the Indians' anticipated future needs. The PIA standard accordingly quantifies the associated water right to permit cultivation of that land.

1. *Arizona I* properly employed the "practicably irrigable acreage" quantification method to measure an Indian reserved water right set aside for future agricultural needs

This Court's decision in *Arizona I* addressed the quantification of these so-called "*Winters*" rights. Arizona brought an original action against California for a determination of the respective States' rights to the use of the waters of the Colorado River and its tributaries (373 U.S. at 550-551). The United States intervened and requested, among other matters, confirmation of federal reserved water rights for five Indian reservations adjoining the mainstream of the Colorado River in Arizona, California, and Nevada. In accordance with *Winters*, the United States urged that when it set aside the Indian reservations, it reserved water for the benefit of the present and future needs of the Indians. The United States further maintained that the amount of water reserved should be ascertained by reference to the practicably irrigable acreage of each reservation. See Brief in Support of Findings of Fact and Conclusions of Law

Proposed by the United States of America 21-35 (before the special master).

The special master carefully reviewed the *Winters* decision and its progeny, the reasonable inferences from the creation of the particular reservations, and the alternative bases for quantification. See *Arizona I*, 1960 Term, No. 8 Orig. Report of Simon H. Rifkind, Special Master 254-266 (Dec. 5, 1960) [hereinafter *Arizona I* Special Master's Report]. See Appendix, *infra* (reproducing the relevant pages). He agreed with the United States' position, stating:

> I have concluded that the United States effectuated the intention to provide for the future needs of the Indians by reserving sufficient water to irrigate all of the practicably irrigable lands in a Reservation, not by the number of Indians inhabiting it.

Id. at 262. The special master explained:

> At the times of the creation of the five Indian Reservations in question, it was impossible to predict the future needs of the Indians who might inhabit them. Indeed, in some instances it was not clear which Indian tribes would ultimately be settled on a particular Reservation. What the United States did, in withdrawing public lands for these Indian Reservations, was to establish areas that could be used in the indefinite future to satisfy the needs of Indian tribes in the United States as those needs might develop. It follows from this that the United States intended to reserve enough water to make the lands productive, in other words, enough to irrigate all of the practicably irrigable acreage. Only by reserving water in this manner could the United States ensure that the Reservation lands would be usable when needed to support an Indian economy.

Ibid.[8] He specifically considered and rejected the possibility of an "open-ended" decree or of a decree based on an abstract prediction of reasonably foreseeable needs. *Id.* at 263-265.

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[8] He further observed (*Arizona I* Special Master's Report 262):

> This conclusion is also supported by the fact that the irrigable land originally withdrawn for each of the five Indian Reservations was con-

This Court reviewed the special master's report and recommendations, and it confirmed his decision to quantify the Indians' reserved water rights through an assessment of the reservations' practicably irrigable lands. *Arizona I*, 373 U.S. at 600-601. The Court agreed that the United States had reserved water rights for the Indians (*id.* at 600), and it further stated:

> We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations. Arizona, on the other hand, contends that the quantity of water reserved should be measured by the Indian's "reasonably foreseeable needs," which, in fact, means by the number of Indians. How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage.

Id. at 600-601. Thus, *Arizona I* adopted the PIA standard for ascertaining the amount of water reserved for the needs of the Indians on a reservation set aside for agricultural purposes, and the Court's subsequent decrees incorporated that standard. See *Arizona* v. *California*, 376 U.S. 340, 344-345 (1964); *Arizona* v. *California*, 439 U.S. 419, 421-423 (1979). As the Court later observed in refusing to reopen certain aspects of the *Arizona I* judgment, "the irrigable-acreage standard allowed a present water allocation that would be appropriate for future needs." *Arizona II*, 460 U.S. at 617.

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siderably more extensive than was necessary to support the Indians who inhabited the Reservations immediately after their establishment. The only explanation for this withdrawal of excess irrigable acreage is that the United States intended it to be utilized in the future. It must have been apparent that unless the United States reserved water for the land at the time of withdrawal, there might be no water left to appropriate at the time that the land was needed for the purposes for which it was withdrawn.

2. *Arizona I*'s quantification method is equally applicable in this case

The Wind River Indian Reservation's reserved water rights for agricultural needs are, by all relevant criteria, indistinguishable from those involved in *Arizona I*, and they should be quantified by the same standard. The Wyoming Supreme Court, the Wyoming district court, the special master, and *even* Wyoming itself (at least in the proceedings below) recognized that fact. Thus, the Wyoming courts quite properly quantified the Tribes' water right for agricultural needs based on *Arizona I*'s principles.

As we have explained, *Arizona I* held that the PIA standard, which measures an agricultural reservation's reserved water right on the basis of the pertinent objective criterion—irrigable acreage—rather than an ultimately subjective prediction of future water consumption, is "the only feasible and fair way" to reach a fixed measure of the Indians' entitlement. *Arizona I*, 373 U.S. at 601. The *Arizona I* special master accurately identified three reasons why this is so: (a) the reservations were established for agricultural purposes and irrigation was necessary "to make the lands productive"; (b) the lands were to be used "in the indefinite future to satisfy the needs of the Indian tribes • • • as those needs might develop"; and, (c) it was "impossible to predict" the number of Indians who might inhabit the reservations or their evolving individual needs. *Arizona I* Special Master's Report 262. The Wind River Reservation shares each of those elements.

First, the Wyoming courts found—and Wyoming does not dispute—that the Wind River Reservation was established for agricultural purposes and that irrigation was necessary to make the reservation lands productive. See, *e.g.*, Pet. App. 26a, 41a, 211a. The Shoshones selected and the United States reserved these lands in full expectation that the Indians would undertake irrigated agriculture. See *id.* at 32a-41a; *Shoshone Tribe*, 304 U.S. at 114, 117-118; *Shoshone Tribe*, 85 Ct. Cl. 341-343, 346. Since the United States reserved the water right to transform the Indians into productive farmers, the natural measure of that

right is the amount of water necessary to make the Indians' farming land productive.

Second, the Wind River Reservation's lands were expected to satisfy the Indians' future needs as those needs might develop. The Wyoming courts correctly recognized that the United States entered into the Second Treaty of Fort Bridger specifically to remove the Indians from a large expanse of territory, to restrict them to a diminished area, and to convert them from a nomadic to an agricultural livelihood. Pet. App. 9a, 34a-41a, 207a. The Treaty contemplated that the Indians would "create an *independent* permanent farming community upon the reservation" to meet their future needs. *Shoshone Tribe*, 304 U.S. at 118 (emphasis added). At the time the Shoshones relocated to the Wind River Reservation, they were "blanket Indians, unable to read, write, or speak English" (*id.* at 114). Like the *Arizona I* Indians, they "were not an agricultural people and it was necessary for them to develop their agricultural skills after settling on the Reservation" (*Arizona I* Special Master's Report 261). Thus, their *Winters* rights necessarily included sufficient water to meet their future uses as they "continued through years." *Winters*, 207 U.S. at 577.[9]

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[9] Indeed, here, as in *Arizona I* (see note 8, *supra*), the United States consciously set aside substantially more agricultural land than the initial occupants, even if trained in farming, would have required. As in *Arizona I*, "the possibility of expanding populations, expanding agricultural development, and hence expanding water needs must have been apparent at the time [the] Reservation was created." *Arizona I* Special Master's Report 260. See *Shoshone Tribe*, 85 Ct. Cl. at 345 (quoting the United States Indian Agent's 1866 recitation of a traveler's report that the region contained "farming land enough to support a population of two hundred thousand persons"). And here, as in *Arizona I*, the "only explanation for this withdrawal of excess irrigable acreage is that the United States intended it to be utilized in the future." *Arizona I* Special Master's Report 262.

Time has shown that this expectation was justified. The Wyoming Supreme Court recognized that of the 108,221 practicably irrigable acres, 54,216 acres had been historically used. See page 8, *supra*. Through most of this century the Wind River Reservation had more success than the Arizona reservations in putting its practicably irrigable acreage into production. For example, the *Arizona I* special master determined that there were 107,558 practicably

Third, when the United States created the Wind River Reservation, the Reservation's future population and its corresponding needs were no more predictable than the *Arizona I* reservations' populations and needs. Not only was it impossible to predict the future growth of the initial Shoshone population, but there was substantial uncertainty over what tribes ultimately would be settled on the Reservation. Article II of the Second Treaty of Fort Bridger gave the Shoshone-Bannock Indians the option of settling on the Wind River Reservation or choosing a separate home (see note 2, *supra*). 15 Stat. 674. In addition, Article II of the Treaty provided for the possible admission of "other friendly tribes" (*ibid.*), including perhaps other Shoshone Tribes that continued to occupy large tracts of western land described in treaties similar to the First Treaty of Fort Bridger. See *Northwestern Bands*, 324 U.S. at 345 n.7. Indeed, the Northern Arapahoes were eventually settled on the reservation, an event that could not have been specifically predicted. See *Shoshone Tribe*, 299 U.S. at 485-491.

Given the essential similarity between the situation in *Arizona I* and the situation here, there is no principled basis for denying the Wind River Indian Reservation application of the PIA standard established in that case.[10] Wyoming essentially con-

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irrigable acres within the Colorado River Indian Reservation (*Arizona I* Special Master's Report 272), only about 30,000 acres of which had been historically irrigated (Arizona's Answering Br. 106). Since the *Arizona I* water rights quantification, however, the Colorado River Reservation has increased its irrigated acreage to an annual average of more than 70,000 acres. See Bureau of Indian Affairs, U.S. Dep't of the Interior, *Special Irrigation Report and Recommendations* 29 (July 1988) (Prepared for the Deputy to the Assistant Secretary – Indian Affairs (Trust and Economic Development)).

[10] Indeed, it can plausibly be argued that the Wind River Reservation, which was created by treaty rather than executive order, has an even higher claim to the PIA standard because "treaties are construed more liberally than private agreements" (*Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 431 (1943)), and certainly no less liberally than non-contractual executive orders. In addition, "[b]y a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians." *Winters*, 207 U.S. at 576.

ceded as much below. It maintained throughout the trial that "if a reserved water right was created on behalf of the Wind River Indian Reservation, it was created solely to provide the Indians living thereon with a supply of water for domestic uses, *for the irrigation of all practicably irrigable land on said Reservation,* and for stockwatering purposes." State of Wyoming's Response to the United States' Statement of Claims 12 (July 16, 1980) (emphasis added). See pages 6-7, *supra*. Even if there are situations where the PIA standard should not be employed, certainly *this* is not one of them. The Wyoming Supreme Court properly concluded that the *Arizona I* standard for quantifying the Indian water rights should be applied in this case.

B. The "Practicably Irrigable Acreage" Standard of *Arizona I* Should Not Be Modified, "Discarded" Or "Replaced"

Implicitly recognizing that *Arizona I* controls this case, Wyoming and its various amici now argue that *Arizona I*'s quantification standard should be modified (by making it generally inapplicable) (Wyo. Br. 21-28), "discarded" (*id.* at 28-47), or "replaced" (*id.* at 47-49). This Court does not lightly "discard" its precedents, and Wyoming provides no basis for doing so here—especially in light of the disparity in the treatment of similarly situated tribes that necessarily would result (from changing a rule that is res judicata in *Arizona I* and in other cases that have followed it. Wyoming's argument rests on a basic misconception of federal reserved water rights and the PIA standard. Wyoming's alternative standard, which would permit state courts to "equitably tailor" (*id.* at 12, 47-48) the reserved right, providing water simply to assure that the purposes of the reservation are "not entirely defeated" (*id.* at 11, 28, 32, 47. 48), is no standard at all.

1. The federal reserved water right doctrine was *not* "created by this Court as a safety net or insurance policy to cure retroactively congressional and executive oversights"

Wyoming's argument proceeds—with its very first sentence (Wyo. Br. 17)—from a fundamental misunderstanding of federal reserved water rights. As we have explained (pages 12-13, *supra*), the United States creates reserved water rights, either expressly or implicitly, through treaties, statutes, or executive action. See, *e.g.*, *Arizona II*, 460 U.S. at 616; *Arizona I*, 373 U.S. at 597. This Court occasionally must perform the traditional judicial task of interpreting a treaty, statute, or order to determine whether such rights in fact were created. When faced with such disputes, it has resolved them as "a question of implied intent" (*New Mexico*, 438 U.S. at 698). See also, *e.g.*, *Cappaert*, 426 U.S. at 138-139; *Winters*, 207 U.S. at 576-577. The courts are not empowered, however, to "create[]" such rights "to repair oversights by Congress and the President" (Wyo. Br. 17). Nor can they erect "safety net[s]" (*ibid.*) or issue "insurance polic[ies]" (*ibid.*) to protect the federal government, an Indian tribe, *or* the States from past legislative and executive actions.

This fundamental point is significant because Wyoming's entire argument is premised on the notion, soundly disapproved in *Arizona I* (373 U.S. at 597) and *Arizona II* (460 U.S. at 616), that Indian reserved water rights are matters of judicial inclination. Founded on this premise, Wyoming's arguments vary from forum to forum and are not moored to the treaty purposes, to past precedents, or to the "compelling need for certainty in the holding and use of water rights" (*Arizona II*, 460 U.S. at 620). Wyoming now argues that the PIA standard it once supported was wrong and that this Court should set aside 12 years of litigation based on that standard and "equitably tailor" (Wyo. Br. 11-12) the water rights at issue to some undefined standard of present need (*id.* at 47, 48). *Arizona I* correctly rejected that approach and, instead, adopted a quantification standard that is based upon the reasonable inferences to be drawn from the executive and legislative action that created the reservation. See pages 13-15, *supra*.

Arizona I's quantification standard, which is intended to provide a "feasible and fair" (373 U.S. at 601) measure of Indian water rights, does not, of course, ignore the question of fairness. The Court obviously considered that factor, but it did so because, as a matter of treaty, statutory, or executive order construction, the United States can be presumed to act "fairly" in its dealings with the Indians. See 373 U.S. at 597, 599-600. Even if, as Wyoming seems to suggest (Wyo. Br. 13), the treaty involved here should be construed to provide the Tribes with no more than a " 'moderate living' " (quoting *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 686 (1979) (*Fishing Vessel*)), the Tribes have not received an excessive award. As we discuss (see pages 35-38, *infra*), the reserved right recognized in this case remains essential now, as it was in 1868, to satisfy the treaty's ultimate goal of meeting the Indians' basic needs.[11]

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[11] In *Fishing Vessel*, this Court interpreted a treaty that gave the Indians the right of taking fish in common with other citizens as providing both Indians and non-Indians "a right secured by treaty, to take a fair share of the available fish" (443 U.S. at 685). In accordance with that construction, the Court held that the Indians were entitled to no more than 50% of the available fish in any given year, subject to modification in light of the treaty's objective of providing the Tribes with a "moderate living" (*id.* at 686-687). *Fishing Vessel*'s specific method for quantifying the Tribes' fishing rights, which permitted a take of fish that would necessarily vary from year to year, cannot be applied to questions of reserved water rights, which must be based on "a *fixed* calculation of future water needs" (*Arizona II*, 460 U.S. at 617). But if Wyoming's point is that, when shared entitlement to scarce natural resources is at issue, the United States should not be presumed (absent contrary evidence) to have provided the Indians with more than a "moderate" living, then the Wyoming Supreme Court's award is consistent with that presumption – since only by means of irrigation can the reserved lands serve their purpose of providing agragian sustenance to the existing and future Indian inhabitants of the Reservation. See note 22, *infra*.

2. **Wyoming has failed to demonstrate any principled basis for limiting *Arizona I*'s "practicably irrigably acreage" standard "to only those agricultural Indian reservations for which there is no other means to quantify the federal reserved water right"**

Wyoming asserts that the PIA standard is inconsistent with the historical practice of quantifying a federal reserved water right based on need and that the PIA standard should be limited to only those reservations where there is no other means to quantify the reserved water right (Wyo. Br. 21-28). Wyoming fails to grasp, however, that irrigable acreage *is* a reasonable measure of the reservation's future agricultural need and that the use of irrigable acreage as a measure dates back to *Winters* itself. See F. Cohen, *Handbook of Federal Indian Law* 316-317 (1942). Moreover, Wyoming ignores *Arizona I*'s basic premise: the PIA standard generally is "the only feasible and fair way" to measure a reserved right based on future agricultural need. 373 U.S. at 601.

a. The *Winters* dispute not only gave legal recognition to the concept of Indian reserved water rights, but it also gave birth to the PIA standard. The *Winters* controversy arose from Indian irrigation activities on the Fort Belknap Indian Reservation in what is now the State of Montana. The United States had set aside that reservation in 1888 as a home for the Gros Ventre and Assiniboine Tribes. Some of the reservation lands were arid, but adaptable to farming if irrigated, and the Indians, with the assistance of the federal government, constructed irrigation facilities and began to irrigate a portion of the reservation lands with water diverted from the Milk River. Upstream non-Indian settlers, however, constructed their own irrigation works and diverted substantially all of the waters of the river. Consequently, the United States sought and obtained an injunction from the federal circuit court restraining the upstream diversions. See *Winters*, 143 F. 740, 741-742 (9th Cir. 1906).

The defendants appealed, specifically asserting that " 'said Circuit Court erred in holding that by the treaty made * * * between the United States and the Indians * * * there was reserved

to the said Indians the right to the use of the waters of the Milk river to an extent reasonably necessary to irrigate the lands included in the reserve created by the said treaty * * *.' " 143 F. at 743.[12] The court of appeals affirmed, stating "we are of the opinion that the court below did not err in holding that 'when the Indians made the treaty granting rights to the United States, they reserved the right to use the waters of the Milk river, *at least to an extent reasonably necessary to irrigate their lands*' " (*id.* at 749 (emphasis added)). See also 148 F.2d 684. This Court, in turn, affirmed the judgment, emphasizing that the reservation of water was necessary to meet the Tribes' future needs. 207 U.S. at 575-578.[13]

Thus, the *Winters* doctrine, since its origins, has been understood to measure the Indians' reserved water rights by reference to their irrigable lands. For example, the noted Indian law scholar, Felix Cohen, characterized *Winters* as holding that "where land in territorial status was reserved by treaty to an Indian tribe, there was impliedly reserved for the Indians, and withheld from subsequent appropriation by others, water of the streams of the reservations *necessary for the irrigation of their lands*." F. Cohen, *supra,* at 316 (emphasis added). See also *id.* at 317 ("no appropriation of water * * * which reduces the amount of water in a stream within an Indian reservation below the amount *necessary for irrigation of Indian lands* is valid") (emphasis added). This follows as a matter of treaty construction. The Indians, by agreeing to cede lands that they did "not re-

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[12] Thus, the *Winters* defendants' description of the trial court's action contradicts Wyoming's assertion that the court was willing to protect only "existing irrigation" (Wyo. Br. 22 n.29).

[13] The Court reasoned, from the terms and circumstances of the agreement creating the reservation, that the United States intended to transform the Tribes from a "nomadic" to a "pastoral and civilized" way of life (207 U.S. at 576) and that the United States implicitly reserved irrigation water to accomplish that objective (*ibid.*). "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years" (*id.* at 577 (citations omitted)).

quire" for the satisfaction of "their present or prospective wants" (Act of May 1, 1888, ch. 213, 25 Stat. 113), presumably retained lands (and water) essential for their future needs.

Wyoming's assertion that "[e]arly quantifications * * * were based on an agricultural Indian reservation's reasonably foreseeable needs" (Wyo. Br. 21) is correct in a sense, but the assertion is incomplete. The courts looked to the Indians' needs, but they determined those needs based on the Indians' irrigable acreage, including lands that could be irrigated in the future. The cases Wyoming cites (which the special master reviewed in *Arizona I*, see Appendix, *infra*) bear this out.

In *Conrad Inv. Co.* v. *United States*, 161 F. 829 (9th Cir. 1908), the court of appeals held that the Indians of the Blackfeet Indian Reservation in Montana had the right to use the waters of Birch Creek, which bordered the reservation, "to the extent reasonably necessary for the purposes of irrigation and stock raising, and domestic and other useful purposes." *Id.* at 831. In measuring the reserved right, the court of appeals decreed a defined amount of water in the quantity set forth by the trial court. The trial court opinion in *Conrad* shows that the decreed quantity was, in fact, based on the total amount of irrigable, rather than irrigated, acreage. 156 F. 123, 129-132 (D. Mont. 1907).[14] The court of appeals, like the trial court, nevertheless provided that the Tribes could reopen the decree "whenever the needs and requirements of the [Indians] * * * for irrigating and other useful purposes upon the reservations exceed the amount of water decreed for that purpose * * *." 161 F. at 835.

Thus, *Conrad* indicated that irrigable acreage was the basis for quantifying the reserved water right for agricultural pur-

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[14] The trial court found that "from 8,000 to 10,000 acres of land upon the reserve is susceptible of irrigation from Birch Creek" (156 F. 130) and concluded from the opinions of several experts that the "amount of 1,666⅔ inches will be ample for the irrigation of 10,000 acres" (*ibid.*). It then entered an injunction affirming "the right of the government to have flowing at all times in the stream the amount of 1,666⅔ inches" (*id.* at 132), adding that "the government will have leave to apply for a modification of this decree at any time that it may determine that its needs will be in excess of the amount of water so designated" (*ibid.*).

poses and, to assure full accommodation of future change or growth in the Indians' needs, provided that the decree confirming those rights should be open-ended. That same court of appeals, speaking in general terms about the effect of two treaties it was construing (including the treaty by which the Wind River Indian Reservation had been created), subsequently stated:

> The purpose of the government was to induce the Indians to relinquish their nomadic habits and to till the soil, and the treaties should construed in the light of that purpose and such meaning should be given them as will enable the Indians to *cultivate eventually the whole of their lands* so reserved to their use."

Skeem v. *United States*, 273 F. 93, 95 (9th Cir. 1921) (emphasis added).

The court of appeals temporarily retreated from that standard in *United States* v. *Walker River Irrigation Dist.*, 104 F.2d 334 (9th Cir. 1939), based on the facts of that case. The United States claimed a reserved right sufficient to irrigate all of the 11,000 irrigable acres within the Walker River Reservation. The court of appeals alluded to the total irrigable acreage standard, but stated that it was "not necessarily the criterion for measuring the amount of water reserved" on the Walker River Reservation (*id.* at 340). It noted that 1900 acres had been put into cultivation by 1886 and that the number of cultivated acres had remained essentially unchanged since then. It held that in light of a declining Indian population and the special master's finding that " 'it has not been shown that there is the necessity or demand for the cultivation of a larger area than [that being irrigated],' " the Indians were limited to their existing use. *Ibid.*[15]

The court of appeals' subsequent decision in *United States* v. *Ahtanum Irrigation Dist.*, 236 F.2d 321 (9th Cir. 1956), cert.

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[15] Even if *Walker River* represented good law, it would not apply in this case since the Tribes' populations are expected to increase substantially in the future. See note 30, *supra*.

denied, 352 U.S. 988 (1957), indicated that *Walker River* was an aberration. The court of appeals stated (236 F.2d at 326):

> It is obvious that the quantum [of reserved water] is not measured by the use being made at the time the treaty reservation was made. The reservation was not merely for present but for future use. Any other construction of the rule in the Winters case would be wholly unreasonable * * *.

It further stated (*id.* at 327):

> It is plain from our decision in the Conrad Inv. Co. case, supra, that the paramount right of the Indians to the waters of Ahtanum Creek was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation.

These cases show that *Arizona I*'s use of the PIA standard to determine a reservation's future irrigation needs is both a logical and an historically recognized outgrowth—a corollary—of the *Winters* doctrine. Wyoming's challenge to the PIA standard is at bottom a challenge to *Winters* itself.

b. Wyoming's argument that practicably irrigable acreage should serve as the quantification measure of last resort suffers from a serious oversight. This Court determined in *Arizona I*, based on its evaluation of the special master's determinations, that the PIA standard is "the only feasible and fair way" to measure a reserved right based on future agricultural need. 373 U.S. at 601. Wyoming argues (Wyo. Br. 24-27) that this case is distinguishable from *Arizona I*, but, as we have shown, it is not distinguishable in any material respect. Wyoming's supposed distinctions, to the extent they are accurate, are irrelevant to the quantification question.

Wyoming first contends that this case is distinguishable from *Arizona I* because "the Wind River Reservation is *not* comprised of lands '. . . of the desert kind—hot, scorching sands. . . .' " (Wyo. Br. 24, emphasis in original). Certainly, this physical

distincton has no legal significance here. The Wind River Reservation's lands are indisputably "rather arid" (*United States* v. *Mazurie*, 419 U.S. 544, 546 (1975)), and require irrigation to make them productive. See Pet. App. 26a, 211a. In the absence of a water right, most of the Reservation's agricultural lands would be "useless" (*id.* at 211a). Moreover, the fact that there generally is more rainfall in Wyoming than in Arizona simply means that there is less competition for water among Indian and non-Indian users.

Wyoming also asserts that this case is distinguishable from *Arizona I* because the Shoshone Tribe "received the Wind River Reservation as a gift" (Wyo. Br. 25). That supposed distinction is incorrect. As we have explained (pages, 3-4, *supra*), the Shoshone Tribe exchanged their claim to the right of occupancy of 44 million acres for shared occupancy of the 3 million acre Wind River Reservation. See, *e.g.*, *Shoshone Tribe*, 304 U.S. at 113; *Shoshone Tribe*, 299 U.S. at 485. Indeed, the fact that the Shoshone Tribe negotiated for and obtained what is, from a hydrological point of view, " 'the best-watered portion of Wyoming' " (Wyo Br. 25) for their agricultural reservation, indicates that they, even more strongly than the Arizona Indians, expected to have the use of the water resources for their future needs.

Wyoming further contends that this case is distinguishable from *Arizona I* because the "Wind River Indian Reservation was set aside *specifically* for the Shoshone Indians" (Wyo. Br. 26 (emphasis in original)). This supposed distinction is also incorrect. As we have explained, the Shoshone Tribe obtained the Wind River Reservation subject to the potential occupancy of the Shoshone-Bannock Tribe and such "other friendly tribes" as might be relocated there, and the Northern Arapahoes subsequently were moved to the Reservation. See pages 4, 18 *supra*. Thus, this case presents essentially the same uncertainties with respect to future Indian population that were present in *Arizona I*.

c. Wyoming argues (Wyo. Br. 27-28) that *Arizona I* should be limited to "resolve the confusion over the reserved water right

quantification standard" (*id.* at 27). The only support Wyoming offers for its contention that such "confusion" exists is a Claims Court case (*White Mountain Apache Tribe* v. *United States*, 11 Cl. Ct. 614, 626 (1987)) that, as Wyoming acknowledges, applied the *Arizona I* standard. See Wyo. Br. 27.[16] In fact, as Wyoming later acknowledges (*id.* at 37 n.53), the lower courts have consistently looked to *Arizona I* as the guide for quantifying future agricultural needs.[17] Indeed, the case law is well-settled; it is Wyoming's position that is confusing.

Wyoming first exhorts this Court to "limit the applicability of its holding in *Arizona I* to those agricultural Indian reservations for which the [PIA] standard is the only measure of the amount of water needed for its primary agricultural purpose" (Wyo. Br. 27). It then changes course and counsels this Court to "unequivocally explain" that *Arizona I* should not be employed "*unless* it can be demonstrated that the standard provides for the quantification of only that water necessary to meet agricultural minimal needs and to insure that the primary agricultural purpose is not entirely defeated" (Wyo. Br. 28 (emphasis in original)). Thus, Wyoming seems torn between dis-

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[16] Wyoming suggests (Wyo. Br. 19 n.25, 27) that the United States employs a different standard for quantification in Indian water rights cases, depending on whether it is a plaintiff or a defendant. This is simply not true. In either instance, the United States seeks a quantification based on a sound scientific, engineering, and economic evaluation of practicably irrigable acreage.

[17] When called on to do so, state and federal courts, like Wyoming's courts here, have uniformly recognized or upheld PIA as the appropriate standard. See, e.g., *United States* v. *Adair*, 723 F.2d 1394, 1415-1416 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984); *United States* v. *Washington*, 694 F.2d 1374, 1383 (9th Cir. 1982); *Colville Confederated Tribes* v. *Walton*, 647 F.2d 42 (9th Cir.), cert. denied, 454 U.S. 1092 (1981); *United States* v. *Superior Court*, 144 Ariz. 265, 272, 697 P.2d 658, 665 (1985); *In Re the General Adjudication of All Rights to the Water in the Gila River System and Source*, Nos. W-1, W-2, W-3, W-4 (Maricopa County, Ariz. Super. Ct. Sept. 19, 1988) slip op. 17-18; *Montana* v. *Confederated Salish and Kootenai Tribes*, 219 Mont. 76, __, 712 P.2d 754, 764 (1985); *New Mexico ex rel. Reynolds* v. *Lewis*, Nos. 20294, 22600 (5th Dist. Ct., Chavez County, N.M.) (proposed op. 11, attached as Appendix A to New Mexico amicus brief).

membering and eviscerating *Arizona I*.[18] Whichever alternative Wyoming means, its suggestion is a prescription for disorder. These proposed glosses on *Arizona I* have no apparent purpose except to extinguish the Tribes' water rights. Indeed, Wyoming does not even hazard to suggest how these peculiar restrictions would be applied.

3. Wyoming has failed to articulate any principled reason why *Arizona I*'s "practicably irrigate acreage" standard should be "discarded" and "replaced"

Having argued that *Arizona I* should be limited, Wyoming next asserts that it should be discarded altogether and replaced (Wyo. Br. 28-47). Wyoming contends that *Arizona I*'s quantification method "results in unjustified windfalls for Indian reservations, it disregards this Court's 'sensitivity doctrine,' and its inflexibility carries with it inherent problems of proof" (*id.* at 28). Wyoming's first two assertions rest on a misunderstanding of this Court's reserved water rights decisions. The third assertion is plainly wrong. We begin by describing Wyoming's two favorite precedents, *Cappaert* and *New Mexico*, and explain how Wyoming has misconceived the relationship between those cases and *Arizona I*. We then discuss Wyoming's three specific assertions and the alternative standard that Wyoming proposes.

a. In *Cappaert*, this court held that when the United States set aside Devil's Hole National Monument, which provided an aquatic habitat for a unique species of pupfish, "it acquired by reservation water rights in unappropriated appurtenant water sufficient to maintain the level of the pool to preserve its scientific value" (426 U.S. at 147). In reaching that conclusion, the Court observed that the existence of a reserved water right turns on the government's intent, and that "[i]ntent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created" (*id.* at 139),

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[18] Wyoming took yet a different position below. It argued in the district court that the PIA standard was *the measure* of the Tribes' minimal needs. See Wyoming's Brief in Support of Motion for Action Upon the Special Master's Report at ii, 24-27 (Mar. 18, 1983).

citing *Arizona I* and *Winters*. It also stated that the reserved rights doctrine "reserves only the amount of water necessary to fulfill the purposes of the reservation, no more" (426 U.S. at 141), citing the specific pages of *Arizona I* that addressed the PIA standard (*ibid.*).[19]

In *New Mexico*, this Court held that when Congress enacted the Organic Administration Act of 1897, ch. 2, 30 Stat. 34, and other legislation that created the national forest system, it implicitly reserved water for two purposes: "to preserve the timber or to secure favorable water flows for private and public uses under state law" (438 U.S. at 718).[20] In reaching that conclusion, the Court observed that its past cases have "emphasized" that implied water rights reserve " 'only that amount of water necessary to fulfill the purpose of the reservation, no more' " (*id.* at 700), quoting *Cappaert* and also citing *Arizona I*'s approval of the PIA standard (*ibid.*).[21]

Cappaert and *New Mexico* are clear reaffirmations of the rationale of *Arizona I*, and thus of the Court's holding in that case that the PIA standard is the appropriate measure for quantifying a water right for an Indian reservation's future agricultural

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[19] The Court also observed that under the presidential proclamation establishing the monument, the underground pool containing the pupfish "need only be preserved, consistent with the intention expressed in the Proclamation, to the extent necessary to preserve its scientific interest" (426 U.S. at 141). The Court added that the district court in that case had "tailored its injunction, very appropriately, to minimal need, curtailing pumping only to the extent necessary to preserve an adequate water level at Devil's Hole, thus implementing the stated objectives of the Proclamation" (*ibid.*).

[20] The Court found this intent "revealed in the purposes for which the national forest system was created and Congress's principled deference to state water law in the Organic Administration Act of 1897 and other legislation" (438 U.S. at 718).

[21] In its next sentence, the Court noted that each time it "has applied the 'implied reservation of water doctrine,' it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated" (438 U.S. at 700). The Court then described *Winters*, *Arizona I*, and *Cappaert* in the associated footnote (*id.* at 700 n.4).

needs.[22] Wyoming nevertheless draws exactly the *opposite* conclusion and argues that *Cappaert* and *New Mexico* have called *Arizona I* into question. Wyoming splices a passing observation from *Cappaert* (see note 19, *supra*) to dicta from *New Mexico* (see note 21, *supra*) and declares a new standard for measuring Indian reserved water rights: the Indians must show "that the water [is] necessary to meet the minimal needs of the Reservation or to insure that its primary agricultural purpose was not entirely defeated" (Wyo. Br. 29). See also *id.* at 11, 33, 48. Wyoming asserts that the Wyoming Supreme Court erred in making a water rights award to the Tribes because it "was awarded in the absence of any evidence showing that [this standard]" was met (*id.* at 29).[23]

The short answer to Wyoming's assertion is that *Arizona I*'s standard, rather than Wyoming's, is the appropriate measure of need. This Court indicated in both *Cappaert* and *New Mexico* that the reserved rights doctrine "reserves only the amount of water necessary to fulfill the purposes of the reservation," but it also indicated that *Arizona I*'s PIA standard properly applies that test in determining an Indian Tribe's future agricultural needs. The Wyoming Supreme Court, the Wyoming district

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[22] This Court's subsequent decision in *Fishing Vessel* also endorsed *Arizona I*. The Court stated, "As in [*Arizona I*], the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than is necessary to provide the Indians with a livelihood – that is to say, a moderate living" (*id.* at 686). See note 11, *supra*.

[23] Thus, Wyoming advances here essentially the same standard (except for the disjunctive form) that it proposed to limit *Arizona I*. See Wyo. Br. 28. See pages 28-29, *supra*. Wyoming seems to contend that under its standard, the Tribes should be limited to their "historic" water use (Wyo. Br. 30). Wyoming's only support for that result is, of course, the Ninth Circuit's 1939 decision in *Walker River*, which (as we explain page 25, *supra*) is the singular aberration in a line of cases stretching from *Winters* to *Arizona I*. In any event, Wyoming ultimately takes an even more restrictive position, contending that the Tribe is entitled only to water sufficient "to irrigate those historically irrigated Indians lands within the Wind River Indian Reservation *which are not and have never been awarded state water rights*" (Wyo. Br. 50, emphasis added). Not even *Walker River* supports that result.

court, and the special master all based their awards on a finding that the United States and the Tribes satisfied *that* standard. There was no other evidentiary burden to meet.[24]

b. Wyoming argues that the PIA standard should not be employed, as a matter of equity, based on the Tribes' turn-of-the-century acquisition of state water permits. See Wyo. Br. 28-35. Wyoming contends that from 1906 to 1915, the Tribes "enjoy[ed] a history of extensive irrigation development pursuant to state awarded water rights" (*id.* at 28) and that application of the PIA standard would therefore create an "undeserved benefit" and a "substantial windfall" (*id.* at 32). But, as we have explained (page 20, *supra*), Wyoming's assertion that a reserved water right should be measured through an equitable balancing based on post-reservation events is fundamentally inconsistent with the concept of a reserved water right. Indeed, this Court's decisions have uniformly rejected the suggestion that federal water rights are subject to an equitable restriction, balancing, or apportionment.[25] The question here, instead, is one of treaty interpretation. The Wyoming courts correctly ruled that the Second Treaty of Fort Bridger's withdrawal of the Wind River Indian Reservation included sufficient water to irrigate the Tribes' practicably irrigable lands, and Wyoming cannot credibly maintain that the award here would provide the

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[24] Indeed, since Wyoming itself agreed throughout the trial that the PIA standard was appropriate for measuring the Tribes' reserved water right (see notes 4, 5, *supra*), Wyoming is in no position to complain that the United States and the Tribes failed to satisfy the appropriate evidentiary burden.

[25] See *Arizona II*, 460 U.S. at 616 (observing that Indian water rights are "decided by recourse to congressional policy rather than judicial equity"); *New Mexico*, 438 U.S. at 698 (stating that the question of the quantity of water reserved is "a question of implied intent"); *Cappaert*, 426 U.S. at 138-139 (rejecting the argument that "the cases establishing the doctrine of federally reserved water rights articulate an equitable doctrine calling for a balancing of competing interests"); *Arizona I*, 373 U.S. at 597 (rejecting the argument that an Indian reservation's "rights to water should be determined by the doctrine of equitable apportionment"); *Winters*, 207 U.S. at 575 (stating, in a case that resulted in substantial hardships to non-Indians—see *Cappaert*, 426 U.S. at 138-139—that the Indians' reserved water rights "turn[ed] on the agreement" between the Tribe and the United States).

Tribes with more than a "moderate" standard of living. See page 21, *supra*.

This Court's past decisions effectively foreclose Wyoming's equitable argument. But since that argument is based on a less than complete exposition of the proceedings below, the history of the Wind River Reservation's water rights, and the present conditions on the Reservation, we feel constrained to point out some of its flaws. The principal thrust of Wyoming's argument below was that the provisions of the Act of March 3, 1905 (ch. 1452, 33 Stat. 1016), which provided that the Tribes could use a residue of certain funds from the sale of their lands to obtain state water rights, indicated that the Second Treaty of Fort Bridger had created no federally reserved water rights. The Wyoming Supreme Court (as well as the district court and the special master) rejected that contention. See Pet. App. 28a-31a. Wyoming has changed the focus of its argument and now asserts that the existence of state water permits places an equitable limitation on the measure of the reserved water right.[26]

Wyoming incorrectly contends that the application of the PIA standard in the face of these state permits has upset settled expectations or produced a windfall. As the Wyoming Supreme Court explained (Pet. App. 28a-31a), the United States secured these permits, before and for a short while after this Court's 1908 *Winters* decision, in an effort to protect the Tribes' rights from non-Indian appropriation in an era of legal uncertainty.[27] Thus,

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[26] Wyoming inaccurately states that the Tribes were awarded "state water rights" (Wyo. Br. 28). The Tribes actually received state water permits. A permit to appropriate water is not a "water right" under Wyoming law in the sense of a vested property right. Rather, a permit gives its holder only permission to appropriate water. A perfected water right does not arise until the permittee puts the water to beneficial use.

[27] Indeed, the Commissioner of Indian Affairs' 1906 Report observed that the Tribes' reserved water rights had recently come under challenge. See Report of the Commissioner of Indian Affairs, *Annual Report of the Department of the Interior* 83 (1906) ("Prior to the [Reclamation Act of 1902] there seems to be no instance of anyone denying the right and power of the General Government to appropriate sufficient water on an Indian reservation

the United States' acquisition of these permits was a legitimate effort to protect the Indians' interests in the event that the question posed in *Winters* was decided adversely to them. There is no merit—equitable or otherwise—to Wyoming's assertion that the United States' efforts to provide this "backstop" for the Tribes' reserved water rights should result in the termination of those rights. Cf. *Conrad Inv. Co.*, 156 F. at 131-132 (the government's approval of non-Indian irrigation works "do es not estop the government in any way as it respects the diversion and use of water from the public streams.").

Wyoming's contention (Wyo. Br. 35) that the recognition of these rights has upset settled expectations is meritless. As a general matter, "[t]he settlers who took up lands in the valleys of the stream were not justified in closing their eyes to the obvious necessities of the Indians already occupying the reservation" (*Walker River,* 104 F.2d at 339). See also, *e.g., Conrad Inv. Co.*, 156 F. at 132. The state permits (which generally were the earliest permits in the basin) put settlers on *additional* specific notice of the Tribes' intention to irrigate 145,000 acres. Moreover, the United States' acquisition of state water permits was accompanied by continued assertions of federal reserved water rights. See Pet. App. 30a-31a. The United States vigorously and successfully defended the Tribes' reserved water rights in *United States* v. *Parkins,* 18 F.2d 642 (D. Wyo. 1926), and *United States* v. *Hampelman,* No. 753 (D. Wyo. 1916) (reproduced at Shoshone Tribe Br. App. in Opp. 1a-2a). See also *Merrill* v. *Bishop*, 287 P.2d 620, 623 (Wyo. 1955). Thus, there was no basis for anyone to believe that the Tribes' water rights depended on state permits; instead, the permits provided an indication of the potential magnitude of the Indians' rights.

Wyoming's assertion (Wyo. Br. 31-35) that the PIA standard has provided the Tribes with a windfall is likewise incorrect. As

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for the needs of the Indians. Recently, however, these have been denied."). The acquisition of state water permits was a response to that challenge. The timing of the applications further verifies this conclusion. The federal officials secured state permits in 1905 to irrigate 125,000 of the 145,000 acres that eventually received permits (see Wyo. Sup. Ct. J.A., Vol. VII, at 520-523). The federal officials' timing coincides with the Commissioner's report and the *Winters* dispute.

a preliminary matter, the United States originally obtained state water permits for irrigating 145,000 acres, a substantially greater acreage than the 108,000 acres found practicably irrigable in this case. Wyoming realizes (*id.* at 28-29), however, that many of the Tribes' state water permits have lapsed. Following *Arizona I*, the United States allowed those permits to expire in light of this Court's reaffirmation of *Winters* and its acceptance of the PIA standard.[28] Wyoming now seeks to capitalize on the United States' and the Tribes' reliance on *Arizona I* by arguing that the Tribes' reserved water rights, as well, should be treated as irretrievably lost. Plainly, it is Wyoming, rather than the Tribes, that seeks an "undeserved benefit" here.

Looking to the realities of the situation, the Wyoming Supreme Court's award of 500,717 acre-feet of water based on 108,221 acres of practicably irrigable land cannot reasonably be called a "windfall." Approximately 58% of that award (290,490 acre-feet of water based on 54,216 irrigable acres) was based on historically irrigated lands. The very fact that those lands have been brought under irrigation is compelling evidence of the Indians' need for the water required to irrigate them.[29] Wyoming itself calculated, based on a 1980 Reservation population

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[28] Wyoming noted in its petition for a writ of certiorari (Pet. 6) that the government's decision to allow the permits to lapse was a response to *Arizona I*. It now mistakenly states that "it can only be presumed the water they produced was not needed" (Wyo. Br. 32). Indeed, the United States' action actually benefitted state water users by eliminating an unnecessary "paper cloud" that would result from having simultaneous federally reserved rights and state water permits for the same acreage. See generally Battle, *Paper Clouds Over the Waters: Shelf Filings and Hyperextended Permits in Wyoming*, 22 Land & Water L. Rev. 673 (1987).

[29] Wyoming virtually conceded as much when it suggested that the United States and the Tribes had failed to produce "evidence indicating that the purposes of the Wind River Indian Reservation have not and would not be satisfied by the historic levels of water usage or that the continuation of historic usage would entirely defeat Congress' primary purpose when it created the reservation." See Wyoming's Proposed Findings of Fact, Conclusions of Law, Judgment, and Interlocutory Decree, Pt. II, Proposed Finding of Fact 7-1, at 526.

estimate of about 4,500 tribal residents, that the historic acreage figure breaks down to only about 12 irrigated acres per Indian.[30] This is far less than the Second Treaty of Fort Bridger's authorization of agricultural allotments of up to 320 acres for heads of families and up to 80 acres for individual Indians who were not family heads (art. VI, 15 Stat. 675) or the general reclamation law's former allowance of 160 irrigable acres per individual.[31] As Wyoming mentions (Wyo. Br. 10, n.7), the total value of the Indians' crop production of the Wind River Reservation in 1987 was approximately $2.2 million. Using 1980 population figures, this figure amounts to a gross production value of less than $500 per Indian.[32]

As for future lands, the Wyoming Supreme Court's award for them (210,227 acre-feet based on 54,005 acres) was in no sense excessive. Wyoming asserts (Br. 28-29) that the fact that these

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[30] See page, 7, *supra*. A population forecast, which the special master found to be a reasonable one (Pet. App. 607a-608a), estimated that the Indian population of the Wind River Reservation would be 6,600 by the year 2000 and 9,740 by the year 2020. See Wyo. S. Ct. J.A., Vol. 10, Exh. 3. Using these figures, the historical land base breaks down to 8.3 acres of irrigated lands per Indian by 2000 and 5.6 acres per Indian by 2020.

[31] See Reclamation Act of 1902, § 4, 32 Stat. 389, 43 U.S.C. 392, 431, 439. In 1982, Congress revised this acreage limitation so that an individual can now obtain subsidized water from a federal reclamation project for up to 960 acres, and even more where an equivalency adjustment is in effect. Sections 204, 207 of the Reclamation Reform Act of 1982, Pub. L. No. 97-293, 96 Stat. 1263, 43 U.S.C. 390dd, 390gg. This revision was made in light of Congress's recognition that "the [acreage] limitations of existing law are too restrictive, given today's economy, to support a viable farming operation." H.R. Rep. No. 458, 97th Cong., 2d Sess. 9 (1982).

[32] Although Wyoming complains, with respect to the historic lands, that "the Wyoming courts fashioned a presumption that if the lands were the subject of a state-awarded water right they were practicably irrigable" (Wyo. Br. 41), the Wyoming Supreme Court noted in rejecting this contention (Pet. App. 60a-62a) that Wyoming initially advocated that very presumption. Moreover, as the Wyoming Supreme Court also observed, "Wyoming did attempt to prove that the claimed adjudicated acreage was not practicably irrigable, and in fact met its burden, convincing the master to delete some 5,017 acres of adjudicated lands" (*id.* at 61a).

lands had not been placed under irrigation demonstrates that they are not "needed." That assertion is based, however, upon the unsupported premise that the Tribes have already placed under irrigation all of the lands that they "need." The fact that the Tribes have already developed a portion of their lands with federal assistance does not show that they have no need similarly to develop the remaining portions of their practicably irrigable lands. To the contrary, the "future" lands may have remained unirrigated for a host of other reasons, such as the absence of a judicial decree quantifying the reserved water right, lack of capital and farming expertise, or the need for additional federal assistance. See note 34, *infra*.[33]

Given the special master's finding that "[t]he history of the Reservation consistently shows a level of unemployment far in excess of the rest of Wyoming" (Pet. App. 569a) (approximately 45% throughout the decade preceding issuance of the special master's report (*id.* at 568a-569a)), it would appear that the Tribes have a compelling need to develop the full agricultural potential of the Reservation. Indeed, even when all of the future projects lands are considered, the Wyoming Supreme Court's award provides a per capita water supply, based on 1980 population figures, for only about 24 acres per Indian.

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[33] Wyoming relies primarily on the Tribes' desire to export water as an example of the Tribes' lack of need. See Wyo. Br. 32-33. This argument is premised on an assumption, fundamentally inconsistent with *Arizona I* and *Winters*, that if the Tribes cannot put water to immediate use, they have no need for it. The United States reserved water for the Indians specifically because "if they were thrown into competition with the more advanced non-Indians in a race to acquire rights to water by putting it to beneficial use, they would have lost the match before it was begun" (*Arizona I* Special Master's Report 261). Even the arid States themselves sometimes find that water set aside for irrigation purposes cannot be put to immediate use and, as an interim solution, they authorize exportation until the irrigation uses develop. See *ETSI Pipeline Project* v. *Missouri*, 108 S. Ct. 805 (1988). Notably, Wyoming joined an amicus brief in that case that defended the water exportation plan at issue. See Brief for the States of Montana, North Dakota, South Dakota and Wyoming as Amicus Curiae in Support of Petitioners. The Wyoming Supreme Court refused to permit the Tribes to export water in this case, and the Tribes have raised that issue in their cross-petition (No. 88-492).

The Wyoming Supreme Court's award also falls far short of providing a "windfall" when the Tribes' water rights are compared to the water rights of non-Indians who reside within the exterior boundaries of the Wind River Reservation. According to Wyoming (Wyo. Br. 4), those non-Indians are currently irrigating some 120,000 acres within the Reservation. Hence, even when the future projects lands are taken into account, the United States and the Tribes are requesting confirmation of a water right quantified on the basis of less land than is now being irrigated by non-Indians within the Reservation.[34]

Finally, these figures must also be viewed in light of their historic context. The Tribes relinquished their claims to vast aboriginal lands in exchange for the Wind River Reservation. The 1868 Treaty that effected this exchange recognizes that the Tribes faced substantial cultural obstacles in developing an agricultural economy and that the Tribes' conversion from a nomadic to an agrarian existence would take time. Petitioner's contention that the Tribes should now be restricted to the "historic" water usage—and prevented from realizing further development of their practicably irrigable lands—is not an equitable result. And if fairness, as a matter of treaty construction, is the question, then the Wyoming Supreme Court's award certainly secures the Tribes "no more than" a "moderate living" (*Fishing Vessel*, 443 U.S. at 686).

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[34] Wyoming asserts that the Tribes have been assisted by "the infusion of massive amounts of congressionally mandated expenditures for the construction of irrigation projects" (Wyo. Br. 29) in the amount of some $2.3 million (*id.* at 5) expended primarily between 1905 and 1915 (*id.* at 28). This figure, however, should be considered in its proper context. The United States has expended almost $72 million to date on the Riverton Irrigation Project, an almost exclusively non-Indian reclamation project located on the Wind River Reservation. Bureau of Reclamation, U.S. Dep't of the Interior, *1984 Summary Statistics, Project Data*, Vol. III, at 309. In contrast, some $4.4 million of federal funds have to date been expended on the Indian project, including the "massive" $2.3 million spent more than 70 years ago. See Bureau of Indian Affairs, U.S. Dep't of the Interior, *Special Irrigation Report and Recommendations* 27 (July 1988) (Prepared for the Deputy to the Assistant Secretary—Indian Affairs (Trust and Economic Development)).

c. Like its first argument, Wyoming's second reason for discarding *Arizona I*'s PIA standard—that it "disregards the 'sensitivity doctrine' " (Wyo. Br. 35)—is premised on a mistaken belief that this Court decides reserved water rights questions based on equitable rules. Wyoming contends that this Court adopted a special rule in *New Mexico* favoring the States in reserved water rights cases to prevent "potential injustice" (Wyo. Br. 18) and as "one means of lessening the taut and harmful grip that reserved water rights can have upon Western water users" (*id.* at 36).[35] Wyoming has coined a new phrase, the "sensitivity doctrine," to describe that supposed result (*ibid.*). But *New Mexico* does not support Wyoming's assertion that the states have this favored status.

As we have explained, *New Mexico* unambiguously states that this Court determines the existence and measure of a reserved water right as "a question of implied intent" (438 U.S. at 698). See pages 20, 32-33, *supra*. *New Mexico* further indicates that the question whether a statute creates a reserved water right may be answered, in part, by reference to other statutes that exhibit a general policy of deference to state water law. 438 U.S. at 701-702. Thus, *New Mexico* identifies a guide to construing statutes; it does not create an equitable rule. Moreover, that guide—to the extent that it is useful here—does not aid Wyoming.

In *New Mexico*, the statute that created the reserved water right at issue—the Organic Administration Act of 1897—followed on the heels of a series of enactments exhibiting deference to state water law. See 438 U.S. at 702 n.5. See also *California* v. *United States*, 438 U.S. 645 (1978). In the course of construing the Act, the Court observed:

> Where water is necessary to fulfill the very purpose for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference

[35] Thus, Wyoming asserts that "[w]hen quantification of a reserved water right will reduce supplies available for water-needy state and private appropriators, this result must be a variable in the quantification equation" (Wyo. Br. 36).

> to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

438 U.S. at 702. In this case, the Wyoming courts concluded that the Second Treaty of Fort Bridger's primary purpose was to transform the Indians from a nomadic to an agrarian culture. Thus, under *New Mexico*'s "primary purpose" rationale, it follows that the United States "reserve[d] the necessary water" to irrigate the Indians' lands, irrespective of other laws.

Moreover, the Second Treaty of Fort Bridger was negotiated in 1868, prior to all of the major enactments, except the Mining Act of 1866, that exhibited deference to state water law.[36] Thus, even if this case involved a "secondary" purpose, there would be no reasonable basis for construing the 1868 Treaty, which regulated relations between the United States and an Indian Tribe in an unsettled territory, based on the then unborn policy of deference to state water law.

Finally, Wyoming has little cause to complain about any lack of sensitivity to its interests. Wyoming litigated this case in its own courts; thus, there is no reason to believe that the forum was hostile to its concerns. Furthermore, the record demonstrates that the Wyoming courts were sufficiently atten-

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[36] The Mining Act of 1866 had, in relevant part, the limited purpose of assuring that "whenever, by priority of possession, rights to the use of water * * * have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same" (ch. 262, § 9, 14 Stat. 253). That statute, unlike the Second Treaty of Fort Bridger, "was not itself a grant of water rights pursuant to federal law" (*California*, 438 U.S. at 656). Instead, the Act was "a voluntary recognition of a preëxisting right of possession, constituting a valid claim to its continued use" (*ibid.*, citations omitted). Since the Wind River region was largely unsettled, the Act had no effect on the region's water resources.

tive to the needs of non-Indian water users.[37] Indeed, the Wyoming Supreme Court even considered Wyoming's conceptually infirm "sensitivity doctrine" (Pet. App. 32a, 69a-72a) and concluded that the proceedings "evidence[d] a sufficient sensitivity to the water needs of other water users" (*id.* at 72a).

d. As its final argument for "discarding" *Arizona I*'s quantification method, Wyoming contends that "[t]he 'practicably irrigable acreage' quantification standard's inflexibility results in inherent problems of proof" (Wyo. Br. 39). Actually, quite the opposite is true. The PIA standard is based on a well-defined concept that predictably relies on objective evidentiary tests.

Practicably irrigable acreage is not a complicated idea. The parties agreed that practicably irrigable acreage consists of "those acres susceptible to sustained irrigation at reasonable costs" (Pet. App. 229a, 534a). That definition requires a three-step analysis: first, a scientific study to identify arable lands (*id.* at 534a-544a); second, an engineering study to determine the feasibility of a proposed project from an engineering standpoint (*id.* at 544a-559a); and third, an economic study to determine whether future lands can be cultivated at reasonable costs (*id.* at 559a-580a).

This three-step process does not involve exotic or arcane principles: it is the same process that engineering firms routinely employ in planning irrigation projects. The process is not court-created; it has developed as a project planning device over an 80 year period, and the methodology is well-established.[38] It

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[37] For example, the claims of the United States and the Tribes for reserved rights for non-agricultural purposes, including groundwater claims, were entirely rejected (Pet. App. 44a). The water rights for the future projects lands were quantified based on an "average water duty * * * more restrictive than the present historic use in Water Division 3" (*id.* at 52a). The Wyoming courts also imposed a more stringent efficiency factor with regard to the historic lands than is currently being met by many non-Indian water users in the area (*id.* at 69a). In addition, the courts and the special master carefully scrutinized the evidence and rejected claims for some 50,000 acres for which the Tribes and the United States claimed water under the PIA standard (*id.* at 72a).

[38] As Wyoming seems to acknowledge (Wyo. Br. 42), this process is conceptually similar to that employed by the Bureau of Reclamation. The concept of

employs familiar disciplines—science, engineering, and economics—that a modern judge routinely encounters in his day-to-day trial activities. And, most importantly, it employs objective evidentiary criteria. The court makes a quantification determination through an essentially factual inquiry.

Indeed, Wyoming's contention that the PIA standard's "inflexibility results in inherent problems of proof" (Wyo. Br. 39) is self-contradictory. Wyoming asserts that the PIA standard is "inflexible" precisely because the standard excludes inquiries that Wyoming believes should be part of the quantification process but that are inherently *incapable* of proof. As we explain further below, Wyoming urges that the quantification inquiry should be completely open-ended, permitting the trial court to "fairly and equitably tailor the reserved rights doctrine to the needs of individual reservations" (*id.* at 12; see *id.* at 47-49). Thus, Wyoming would have the courts engage in a standardless equitable and sociological inquiry. Wyoming decries the "excruciating evidentiary exercise involved in determining practicably irrigable acreage" (*id.* at 47), but—paradoxically—it argues for a more complicated, and less predictable, evidentiary proceeding.[39]

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practicable irrigability developed in response to the Reclamation Act of 1902, ch. 1093, § 4, 32 Stat. 389, which provided in relevant part (emphasis added):

> [u]pon the determination by the Secretary of the Interior tha. any irrigation project is *practicable*, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be *practicable* to construct and complete as parts of the whole project * * * and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question.

See 43 U.S.C. 419. Thus, the western States and their water users—the primary beneficiaries of the reclamation laws—are familiar with the principles.

[39] Wyoming argues that quantification based on future irrigation is "nothing more than speculation" (Wyo. Br. 42) and that it is "doubtful that the 'future' projects would ever be built" (*id.* at 46). However, since a reserved water right is designed to meet future needs, any quantification measure must entail some predictions. And since the PIA standard rests on concepts of

Wyoming makes no real showing that the PIA standard is unworkable; instead, it raises a series of challenges to the district court's and the special master's factual findings. The Wyoming Supreme Court correctly rejected those challenges, which turned largely on conflicting expert testimony, and there is no need to dwell on them here. Indeed, as the opinions below indicate, the issues here are readily capable of judicial resolution. At bottom, Wyoming seeks to retry factual issues that have

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scientific, engineering and economic feasibility, it assures that the forecasting is reasonable. That fact is demonstrated in *Arizona I*, where the Colorado River Indian Reservation, which received a water right based on 108,000 practicably irrigable acres (and had historically irrigated about 30,000 acres), is now irrigating about 70,000 acres—a dramatic increase from 1963 levels. See note 9, *supra*.

General stream adjudications tend to be complicated, whether or *not* they involve Indian claims subject to the PIA standard, because they typically involve every claimed water right in a large geographic area. Thus, Wyoming is mistaken to ascribe the length and complexity of these suits to the use of the PIA standard. In any event, as this case illustrates, the trial courts are able to consider the evidence and reject claims for which they find insufficient support in the record. Indeed, although amicus New Mexico asserts (Br. 4) that the PIA standard is subject to abuse in application through "manipulations of data [which] make it possible to claim that huge amounts of lands are, under some speculative factual analysis, 'practicably' irrigable" (*ibid.*), its only support for that claim is a case where the trial judge applied the PIA standard and *rejected* the Tribes' claims, stating that "the United States and Tribe have failed to sustain their burden of proof" (*id.* at A13).

Wyoming's standard, by contrast, would be considerably more complex than the PIA standard. Wyoming would require a "foreseeable needs" inquiry (Wyo. Br. at 21-24), even though this Court rejected that inquiry in *Arizona I*, stating that "[h]ow many Indians there will be and what their future needs will be can only be guessed" (373 U.S. at 600-601). Wyoming would also require a standardless inquiry into the Tribes' "minimal needs" (Wyo. Br. 29, 37) and various "sensitivity" factors, including the "circumstances surrounding the reservation" (*id.* at 37), "whether quantification will damage water-needy state and private appropriators" (*ibid.*) and "the degree of injury to be suffered state users [*sic*]" (*id.* at 39), and "whether the reservation has had an opportunity to fully develop its agricultural industry" (*id.* at 48). All of these inquiries (and others) apparently might *supplement* the PIA analysis (*id.* at 48 & n.76.).

been resolved against it in *three* state forums. We answer those assertions in the margin.[40]

e. In its closing pages, Wyoming outlines its alternative to the PIA standard (Wyo. Br. 47-49). It concludes that the existing standard "should be replaced by a tailored approach" (*id.* at 47) that would leave state courts "at liberty to award reserved water rights in amounts" (*ibid.*)

> that are calculated to insure that a reservation's primary purpose(s) is not "entirely defeated;" that, insofar as possible with the constraints of the primary purpose, provide the reservation's Indians with water necessary to a "moderate" living standard; and, that will be "sensitive" to potential dislocation of state water rights.

In short, the Tribes are entitled to what the court thinks is fair, provided that the amount is not more than necessary to assure that their very existence is "not entirely defeated" (*ibid.*).

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[40] Wyoming asserts (Wyo. Br. 43) that the United States' witnesses "classified as arable some 26,275 acres which previously had been classified as *non*-arable by the Bureau of Reclamation." Wyoming neglects to mention, however, that the Bureau's 1961 investigation to which it refers examined arability based only on gravity irrigation whereas the much more recent HKM study—the study by the engineering firm that identified the arable lands for the United States—determined arability for both gravity and sprinkler irrigation systems.

Wyoming also attempts to discredit the Wyoming courts' factual findings by referring (Wyo. Br. 43, n. 66) to the testimony of one of its witnesses at trial, a former employee of the United States Soil Conservation Service, who "testified that the physical inquiry upon which the [future] projects were based was 'wholly inadequate.' " This testimony was not credited by the special master, probably in part because the Soil Conservation Service does not conduct arability studies (Tr. 10657) and the witness, Mr. Fowkes, said he had never done a land classification study (Tr. 10679-10681). Wyoming's assertions that the HKM study lacks the requisite degree of thoroughness rings particularly hollow in light of the cursory analysis performed by Wyoming's witnesses. As the special master found (Pet. App. 674a-675a):

> Experts for the State of Wyoming reviewed the HKM data, but spent limited time in the field on the Reservation. The thrust of their testimony was to question the amount of arable land HKM identified. Mr. Fowkes' testimony was general in nature, and he presented no acreage totals he felt should be deleted from those identified as arable by HKM.

Wyoming gives no specific guidance on how to apply this standard, but it does propose an ultimate result for this case. What emerges from Wyoming's "black box" is a suggested decree "awarding a Federal reserved water right in only the amount of water necessary to irrigate those historically irrigated Indian lands within the Wind River Indian Reservation which are not and have never been awarded state water rights" (Wyo. Br. 50). Thus, Wyoming's "equitable tailor[ing]" (*id.* at 12) would exclude the whole of the 145,000 acres that the Tribes intended to irrigate at the turn of the century (see pages 33-35, *supra*) and would include only whatever *other* lands that the tribes have *since* irrigated without a state permit. This is not a reserved right. It is, at best, a consolation prize. Moreover, this is the first time in this litigation that Wyoming has suggested an award on that basis.[41]

Wyoming ultimately tells us very little about its proposed quantification standard, but what it does tell us strongly counsels against its adoption. As Wyoming's own application of the standard shows, its produces harsh, unpredictable results that have no relationship to the central principle of "implied intent" (*New Mexico*, 438 U.S. at 698) that governs reserved water right determinations. Wyoming's various amici also argue that the PIA standard should be discarded and replaced, but on the question of an adequate alternative, they are in complete disarray.

For example, the State of California and the Metropolitan Water District of Southern California apparently advocate the use of open-ended decrees (Br. 11, 13-14), notwithstanding this

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[41] As we have explained, prior to trial before the special master Wyoming had contended that if there was a reserved right, that right should be quantified by use of the PIA standard in the amount of 323,716 acre-feet, which included a portion for future lands. See page 6, *supra*. Following trial, Wyoming argued that if a reserved right existed PIA was the appropriate standard, but implied that the reserved right extended only to historically irrigated acreage, including acreage for which a state appropriation permit had been secured. See *id.* at 7. Now, Wyoming urges this Court to direct the entry of a decree recognizing a reserved right only for those Indian lands which have been historically irrigated but have *never* had a state permit.

Court's express disapproval of that practice.[42] New Mexico argues that this Court should adopt a standard that will address "the broader purpose of a reservation created for a people" and that, based on present day needs, will "make the reservation a viable place for people to live, a home" (Br. 8.).[43] A group of New Mexico's communities takes direct issue with New Mexico's proposal to quantify federal reserved rights based on present day purposes (County of Chaves Br. 2 n.2) and suggests that this Court should devise some unidentified standard of quantification "tailored to a demonstration of the needs associated with the contemporaneous purposes for which Indian reservations were created" (*id.* at 12).[44] The Village of Ruidoso, also in New Mexico, takes yet a different course, urging the Court to adopt a quantification standard based on "minimal needs" (Br. 13).

The States of Arizona, Idaho, Montana, Nevada, Utah, and Washington suggest that this Court should adopt a "necessity" standard which "requires the balancing of many factors, one of which may be the use of PIA methodology" (Br. 20). The suggested standard is really one of no standards at all. The Salt River Project Agricultural Improvement and Power District, which is located in Arizona, goes a step further and calls for a

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[42] In *Arizona I*, those parties admittedly (Calif. Br. 11) bypassed their opportunity to explain their views on the quantification issue to this Court (*id.* at 11). This Court expressly rejected the open-ended decree alternative in *Arizona I* and reiterated its disapproval in *Arizona II*, 460 U.S. at 617, 622-623 n.15, because the alternative would not fulfill the essential requirement of "a *fixed* calculation of future water needs" (*id.* at 617, emphasis in original).

[43] The standard would recognize "current uses" and decree "water for future uses based on a projected population figure," but "be capped by actual needs" (New Mexico Br. 11). This standard superficially resembles the Indian homeland concept that was rejected in this case. The New Mexico concept, however, appears to be entirely detached from the original purposes for which the reservation was created and would require extensive speculation concerning the extent of the Indians' "actual" needs.

[44] The New Mexico communities, which provide no guidance on how to construct such a standard, overlook that the PIA standard itself was designed to measure, in their words, "the needs associated with the contemporaneous purposes for which Indian reservations were created."

virtually complete delegation to the lower courts to conduct a "Solomonic balancing of a myriad of factors" (Br. 18), which would apparently result in a different quantification standard for each reservation. The City of Phoenix, Arizona, argues, by contrast, that "[t]he Shoshone and Northern Arapaho federal reserved rights should * * * be quantified as the amount of water the tribes put to actual beneficial use on the Wind River Indian Reservation *under the laws of the State of Wyoming*" (Br. 3, emphasis added)—a standard that is essentially the converse of Wyoming's.

Thus, Wyoming and its amici are united in their opposition to the PIA standard, but they are unable to reach any agreement on an appropriate replacement. The standards that they propose have either been rejected by this Court, are manifestly inconsistent with the concept of a reserved water right, or are so vague as to provide no guidance at all. This is no accident. As this Court explained in *Arizona I*, the PIA standard is generally the "only feasible and fair way" to measure a water right that was reserved for the Tribes' future agricultural needs. Indeed, if the proposed alternative standards have a common theme, it is to require Indian Tribes to compete with non-Indians for water. Given the Indians' relative state of poverty and unemployment, they would inevitably lose that competition, and lose as well any hope of attaining self-sufficiency.

At bottom, Wyoming's (and its amici's) arguments simply confirm that *Arizona I* should continue to provide the general rule for measuring Indian reserved water rights. If the PIA test is not the exclusive basis for quantifying such water rights, it is certainly the essential baseline, and any party seeking to deviate from that baseline must demonstrate a compelling justification—drawn from the terms or implications of the relevant treaty, statute or executive order—for the departure. What circumstances might conceivably justify such a departure need not be decided here. In the case now before this Court, no adequate grounds for deviating from the PIA standard have been demonstrated.

C. The Retention Of The "Practicably Irrigable Acreage" Standard Of *Arizona I* Is Essential To Assure An Orderly, Efficient, And Certain Resolution Of This And Other On-going Indian Water Rights Disputes

We have explained the legal and logical force of the PIA standard. In addition, a central practical consideration, "the compelling need for certainty" (*Arizona II*, 460 U.S. at 620), forcefully counsels its retention and continued use. "Certainty of rights is particularly important with respect to water rights in the Western United States" (*ibid.*). Here, the interest in certainty manifests itself in three ways.

First, there is the need for certainty in the form of a final resolution of this litigation. This suit, which Wyoming initiated in its own courts, has consumed 12 years and substantial resources for all concerned. Relying on *Arizona I*, the Wyoming courts have completed a quantification of the Tribes' reserved rights based (with Wyoming's initial support) on the PIA standard. Changing the basic premise for quantification now—whatever alternative standard were adopted—would mean that the 12-year effort was for naught, and would require that the quantification begin anew.[45] This would be a particularly dramatic step here, where the Wyoming Supreme Court, the Wyoming district court, and the special master were in substantial agreement on the Tribes' entitlement. The intervening uncertainty would be a serious setback for both Indian and non-Indian development. See *Arizona II*, 460 U.S. at 620-621.

Second, there is a need for certainty with respect to Indian water rights adjudications generally. As a result of universal judicial adherence to *Arizona I* over the past 25 years, the PIA standard has generated significant expectations, reliance, and

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[45] The Court's concern in *Arizona II* that the "urge to relitigate, once loosed, will not be easily cabined" (460 U.S. at 625) is equally relevant here. The imposition of a new quantification standard would necessarily call into question all of the Wyoming courts' quantification rulings, including those matters that the Tribes themselves have raised in their cross-petition.

investment, both legal and financial. For example, it forms the basis of proof in ongoing litigation, or is the cornerstone of current settlement negotiations, in virtually all western water rights quantifications.[46] The abandonment of the PIA standard at this juncture would be a drastic setback to the orderly and efficient resolution of these disputes. Since any alternative standard would be subject to further judicial interpretation, there would commence a new era of legal uncertainty, retarding the preferred course of amicable settlement, fomenting additional litigation, and ultimately impeding the beneficial use of disputed waters.

Finally, there is the need for certainty and continuity in reserved water rights theory and practice. Consistent with *New Mexico*'s observation that the existence and size of a reserved

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[46] Such ongoing matters include: *In Re Gila River Adjudication*, Civ. Nos. W-1, W-2, W-3, W-4 (Maricopa County Super. Ct., Ariz., Consolidated 1981); *In re the General Adjudication of All Rights of Water Use in the Little Colorado River System and Source*, No. 6417 (Apache County Super. Ct., Ariz. 1978); *In Re Adjudication of Indian Water Rights in Water Division No. 7*, Civ. Nos. W-1603-1603-J, (Colo. Dist. Ct., Water Div. No. 7 1972); *In re the General Adjudication of Rights to the Use of Water from the Snake River Basin Water System*, Civ. No. 39576, (5th Dist., Twin Falls County, Idaho 1987); *United States* v. *Abousleman*, No. CIV-83-1041 SC (D.N.M. 1983); *New Mexico ex rel. Reynolds* v. *Aragon*, No. CIV-7941 SC (D.N.M. 1969); *New Mexico ex rel. Reynolds* v. *Abeyta*, No. CIV-7896 SC, CIV-7939 SC (D.N.M. 1969); *New Mexico ex rel. Reynolds* v. *Abbott*, No. CIV-7488 SC, CIV-8650 SC (D.N.M. 1968); *New Mexico ex rel. Reynolds* v. *Aamodt*, No. CIV-6639 M (D.N.M. 1966); *City of Gallup* v. *United States*, Civ. No. 84-164 (11th Dist., McKinley County, N.M. 1984); *New Mexico ex rel. Reynolds* v. *Kerr-McGee Corp.*, Nos. CB-83-190-CV, CB-83-220-CV, Consolidated (13th Dist., Cibola County, N.M. 1983); *New Mexico ex rel. Reynolds* v. *United States*, No. 75-184, (11th Dist., San Juan County, N.M. 1975); *New Mexico ex rel. Reynolds* v. *Lewis*, Nos. 20294, 22600 Consolidated (5th Dist., Chavez County, N.M. 1956); *In the Matter of the Adjudication of the Existing Rights to the Use of All the Water, Both Surface and Underground, in All the Water Basins in the State of Montana* (initiated by petition of the Montana Attorney General in the Montana Supreme Court 1979, adjudication of Indian rights in Montana State Water Courts suspended pending ongoing negotiations); *In re Confederated Tribes of the Warm Springs Indian Reservation, Oregon* (not filed, negotiations begun in 1987); *Washington* v. *Acquavella*, Civ. No. 77-2-01485-5 (Yakima County Super. Ct., Washington 1977).

water right is a "question of implied intent" (*New Mexico*, 438 U.S. at 698), the PIA standard has its source in the documents—whether they be treaties, statutes, or executive orders—by which the reservation was established. Hence, a reserved right quantified by use of the PIA standard ultimately rests upon congressional or executive intent. Furthermore, it is measured through an objective process based on scientific, engineering, and economic information.

Should this Court decide to abandon the PIA standard as the touchstone for quantifying the water reserved for the agricultural uses of Indians, it would be confronted with the problem of devising a suitable replacement. Consideration of this side of the problem confirms this Court's wisdom in adopting the PIA standard in *Arizona I*. That is perhaps most persuasively shown by the cacophony displayed in the briefs of the *amici curiae* and of Wyoming itself. In the 25 years since the *Arizona I* decision, the western States and their political subdivisions have yet to develop a principled alternative to the PIA standard.

At bottom, this case presents a clear choice—as much as any lawsuit can—between stability and disorder. We urge the former.

CONCLUSION

The judgment of the Supreme Court of Wyoming should be affirmed.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
DONALD A. CARR
Acting Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General
EDWARD J. SHAWAKER
ROBERT L. KLARQUIST
JAMES J. CLEAR
MICHAEL J. MALMQUIST
Attorneys

APRIL 1989

In the Supreme Court of the United States

OCTOBER TERM, 1960

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, DEFENDANTS

THE UNITED STATES OF AMERICA AND STATE OF NEVADA, INTERVENERS

STATE OF UTAH AND STATE OF NEW MEXICO, IMPLEADED DEFENDANTS

Simon H. Rifkind, *Special Master*

REPORT

December 5, 1960

* * * * *

IV. The Claims of the United States to Water in the Mainstream of the Colorado River

The United States claims, in addition to control of the mainstream by reason of the Boulder Canyon Project Act and its ownership and management of the various dams and works which regulate mainstream water, the use of water in the Lower Basin for a variety of its projects and needs. The United States urges that it has reserved water for the use of the various Indian Reservations, National Forests, Parks, Recreational Areas, Monuments, Memorials and lands under the control of the Bureau of Land Management located in the Lower Basin. The United States also claims the right to fulfill its treaty obligations by delivering 1,500,000 acre-feet of water per annum in the Colorado River at the Mexican border, and by consuming water on wildlife refuges and management areas located in the Lower Basin. Finally, the United States claims the right to deliver water from Lake Mead to Boulder City, Nevada, pursuant to a federal statute.

A. Indian Reservations

The United States argues that it has reserved water flowing in the Colorado River and its tributaries in the Lower Basin for the needs of all of the Indian Reservations located within the Lower Basin. Thus the United States claims that each Indian Reservation has the right to divert and consume the amount of water necessary to irrigate all irrigable acreage on the Reservation and to satisfy related needs, subject only to the priority of appropriative rights established before a particular Reservation was created and water reserved for its benefit.

Arizona argues that the rights of the various Indian Reservations on the tributaries ought not to be adjudi-

cated in this case.[1] I agree with Arizona that there is no need in this litigation to adjudicate the rights or priorities of Indian Reservations diverting water from the Lower Basin tributaries, except for the Gila River. For the reasons detailed at pages 318-321, 323-324, *infra*, it would be inappropriate at this time to apportion water in any of these tributaries, except the Gila River. Moreover, it would certainly be inappropriate to attempt a determination of the rights and priorities between each Indian Reservation and the myriad individual users who divert water from these tributaries.[2] As to Indian Reservations on the Gila River System, I have made recommendations concerning the United States claims in a subsequent section of this Report at pages 332-334.

As to the mainstream Indian Reservations, I have concluded that it is necessary to determine their water rights, and I have done so in the Findings of Fact and Conclusions of Law which conclude this section of the Report. The United States claims it has reserved mainstream water for Indian Reservations under federal law, independently of the state law of appropriation, in quantities sufficient to irrigate all the irrigable acreage in each of the Reservations and to satisfy related uses. Arizona and California resist this claim. Arizona asserts that the quantity of water reserved for an Indian Reservation is no more than that amount necessary to satisfy the requirements of Indians living on the Reservation at any particular time. California also denies that the United States intended to reserve water for all irrigable lands on an Indian Reservation.[3]

This disagreement presents a justiciable controversy between the United States and the States of Arizona and California which ought to be adjudicated in this case in order

[1] Ariz. Answering Brief, pp. 92-108.
[2] See Tr. 13796-13810.
[3] Calif. Brief, pp. 177-195; Calif. Response to U. S., pp. 112-127.

that the Secretary may know how much water he may release for consumption on each Indian Reservation. Thus in periods when there is insufficient water for the Secretary to fulfill all of his delivery obligations to users in a particular state, he will have to satisfy them according to priority. In such a case it will be necessary for him to know the rights and priorities of Indian Reservations as against other users within the state.[4] What these rights and priorities are can be determined only by resolving the controversy between the United States and the States of Arizona and California over the validity and scope of the reservations of mainstream water which the United States claims to have made. Indeed, if the Indian Reservations can acquire water rights only pursuant to state law, the Secretary may be prohibited from delivering any mainstream water to some of them since, so far as the evidence shows, some of the Reservations have never complied with the formalities required by the applicable state law in order to obtain a water right. Furthermore, the claims of the United States to water from the Colorado River for the benefit of Indian Reservations are of such great magnitude that failure to adjudicate them would leave a cloud on the legal availability of substantial amounts of mainstream water for use by non-Indian projects.

Since the Secretary cannot know how to operate Hoover Dam and the mainstream works below unless the controversy between the United States and the States of Arizona and California is resolved, since failure to adjudicate it will leave non-Indian users in doubt as to the water available for their use, and since this controversy has been prop-

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[4]It should be noted that, under similar circumstances, the Secretary may need to know the water rights intrastate of other users. In the case of the California agencies who are parties to this suit these rights are set out in the Seven-party Agreement. Such rights of other users not parties to this suit obviously cannot be determined herein.

erly presented in this case, it is appropriate to adjudicate it here.

The United States claims are sustained.

It has been established that the United States has the power to reserve water for the benefit of an Indian Reservation, created out of public lands, and that such a reservation of water creates a water right good against subsequent appropriators even if they beneficially use the water before the Reservation uses it. In short, the United States has the power to create a water right appurtenant to such lands without complying with state law. *Winters* v. *United States*, 207 U. S. 564 (1908), involved a suit by the United States on behalf of the Fort Belknap Indian Reservation, which was created by treaty between the United States and various Indian tribes on May 1, 1888. The land set apart for the Indians under the treaty was arid, but susceptible of sustaining agriculture if irrigated from the Milk River, a non-navigable stream which formed the northern border of the Reservation. The Court found that it was the intention of the United States and the Indians that the Indians should settle on the Reservation and change from a nomadic to a "pastoral and civilized people." 207 U. S., at 576. Subsequent to the establishment of the Indian Reservation, the defendants in the case acquired lands along the Milk River upstream from the Reservation under the Desert Land Act, 19 Stat. 377 (1877), by settling on the land and putting it to productive use by irrigation with water diverted from the Milk River. Some of the defendant farmers diverted water from the Milk River and obtained appropriative rights thereto under the Desert Land Act and the local law of Montana as early as 1895. 143 Fed. 740, 742 (1906). According to the opinion of the Circuit Court of Appeals, the Indians were diverting, at the time of trial, 5,000 miners' inches of water, most of which they began to use after appropriative rights of some of the defendants

had vested. The United States successfully sued to enjoin the upstream farmers from interfering with the flow of water to the Fort Belknap Reservation.

The Supreme Court affirmed the trial court's holdings that "there was reserved to said Indians the right to use the water of Milk River to an extent reasonably necessary to irrigate the lands included in the reserve created by the said treaty . . .," and that the defendants would be enjoined from interfering with the flow of 5,000 miners' inches of Milk River water to the Reservation. 143 Fed., at 743. The Supreme Court thus held that the reservation of water was effective as of the date that the Fort Belknap Reservation was created, 207 U. S., at 577, and that the appropriative rights obtained by the defendants subsequent to the time that the water was reserved but prior to the time that it was put to use on the Reservation were subordinate to the Reservation's rights.

The Supreme Court supported this result with the following reasoning, at p. 577:

> "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. . . . That the Government did reserve them we have decided, and for a use which would be necessarily continued through the years."

The *Winters* case has been cited many times as establishing that the United States may, when it creates an Indian Reservation, reserve water for the future needs of that Reservation, and that appropriative water rights of others established subsequent to the reservation must give way when it becomes necessary for the Indian Reservation to utilize additional water for its expanding needs. *United States* v. *Powers*, 305 U. S. 527 (1939); *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U. S. 988 (1957); *United States*

v. *Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939); *Conrad Investing Co.* v. *United States*, 161 Fed. 829 (9th Cir. 1908). In the *Winters* case the United States exercised its power to reserve water by a treaty; but the power itself stems from the United States' property rights in the water, not from the treaty power. Since the United States has the power to reserve water, by treaty, against appropriation under state law, there is no reason why it lacks the power to do so by statute or executive order. In the *Walker River* case, the Court of Appeals squarely held that the United States had reserved water for an Indian Reservation which had been created by executive order.

It is unnecessary, for the purposes of this case, to explore the origin or limits of such power to reserve water against subsequent appropriators. The authorities cited above sufficiently sustain the validity of such a reservation to preserve the Indians' rights here under consideration.

The question to be decided, therefore, as to each Indian Reservation which can divert water from the mainstream of the Colorado River is whether the United States exercised the power to reserve such water for the Reservation's future needs. As stated in the *Walker River* case, 104 F. 2d, at 336:

> "The power of the Government to reserve the waters and thus exempt them from subsequent appropriation by others is beyond debate. . . . The question is merely whether in this instance the power was exercised."

The United States need not expressly reserve waters for the benefit of an Indian Reservation; an implied reservation is effective. Indeed, in all of the cases cited above, including *Winters* v. *United States* itself, the intent to reserve water was never explicitly stated at the time the Indian Reservation was established; rather that intent was implied from the circumstances surrounding the creation of the Reservation. In the present case I have found that the

United States intended to reserve mainstream water for the reasonable future needs of the following Indian Reservations: Chemehuevi, Cocopah, Yuma, Colorado River and Fort Mohave. As to each it is apparent that it was intended that the Indians would settle on the Reservation land and develop an agricultural economy. The land, however, is too arid to support such an economy without irrigation from the Colorado River. It would be unconscionable for the United States to have coerced or induced Indians onto a Reservation without providing the water necessary to make the lands habitable. I refuse to accept this possibility as to any of the mainstream Indian Reservations since there is no evidence as to any of them that such was the case. As the Court of Appeals stated in the *Walker River* case, at page 339: "It would be irrational to assume that the intent was merely to set aside the arid soil without reserving the means of rendering it productive."

Also, wherever I have found an intent to reserve water, I have inferred, absent evidence to the contrary, that the reservation was not limited to the needs of the population then resident upon the land, nor to the acreage being irrigated when the Reservation was created. I have concluded that enough water was reserved to satisfy the future expanding agricultural and related water needs of each Indian Reservation. Invariably the United States intended that the Indian tribes settled on a Reservation would remain there for generations, and the possibility that other Indians would be settled on the Reservation could not be excluded. Certainly the possibility of expanding populations, expanding agricultural development, and hence expanding water needs must have been apparent at the time each Reservation was created. It is unreasonable to attribute to the United States an intention or an expectation that the Indians would remain stagnant or die out when they were settled on a Reservation. Since the Indians could remain

on these Reservations and develop their society and economy only if water from the Colorado River was available to meet their future needs, I have found that the United States, when it reserved water, reserved it for all of such needs.

This conclusion comports with the holdings in the three cases decided by the Court of Appeals for the Ninth Circuit which are cited above. As that Court stated in *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321, 327 (9th Cir. 1956):

> "It is plain from our decision in the *Conrad Investing Co.* case, *supra*, that the paramount right of the Indians to the waters of Ahtanum Creek was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation."

The conclusion reached here is also consistent with the holding in the *Winters* case that the upstream farmers could not interfere with uses on the Indian Reservation which were initiated subsequent to the farmers' diversions.

The suggestion is unacceptable that the United States intended that the Indians would be required to obtain water for their future needs by acquiring appropriative rights under state law. The Indians were not an agricultural people and it was necessary for them to develop their agricultural skills after settling on the Reservations. It must have been apparent that if they were thrown into competition with the more advanced non-Indians in a race to acquire rights to water by putting it to beneficial use, they would have lost the match before it was begun. Rather than assuming that the United States intended to put the Indians in the position of having to leave their Reservations as their water needs increased if they were unable to satisfy these needs by acquiring appro-

priative rights under state law, I have concluded that reservations of water by the United States included enough to supply expanding needs regardless of state water law.

This brings us to the question of quantity. This is sharply debated, and many conflicting views have been advanced. I have concluded that the United States effectuated the intention to provide for the future needs of the Indians by reserving sufficient water to irrigate all of the practicably irrigable lands in a Reservation and to supply related stock and domestic uses. The magnitude of the water rights created by the United States is measured by the amount of irrigable land set aside within a Reservation, not by the number of Indians inhabiting it. At the times of the creation of the five Indian Reservations in question, it was impossible to predict the future needs of the Indians who might inhabit them. Indeed, in some instances it was not clear which Indian tribes would ultimately be settled on a particular Reservation. What the United States did, in withdrawing public lands for these Indian Reservations, was to establish areas that could be used in the indefinite future to satisfy the needs of Indian tribes in the United States as those needs might develop. It follows from this that the United States intended to reserve enough water to make the lands productive, in other words, enough to irrigate all of the practicably irrigable acreage. Only by reserving water in this manner could the United States ensure that the Reservation lands would be usable when needed to support an Indian economy. This conclusion is also supported by the fact that the irrigable land originally withdrawn for each of the five Indian Reservations was considerably more extensive than was necessary to support the Indians who inhabited the Reservations immediately after their establishment. The only explanation for this withdrawal of excess irrigable acreage is that the United States intended it to be utilized in the future.

It must have been apparent that unless the United States reserved water for the land at the time of withdrawal, there might be no water left to appropriate at the time that the land was needed for the purposes for which it was withdrawn.

Arizona argues that the United States reserved water for the Indians themselves and not for the lands withdrawn for a Reservation. Arizona seems to envisage that the United States intended to create water rights in gross which would fluctuate in magnitude as the Indian population and needs fluctuated, the water right being measured by the amount of water needed at any particular time by the Indians actually inhabiting a particular Reservation. As pointed out above, the more sensible conclusion is that the United States intended to reserve enough water to irrigate all of the practicably irrigable lands on a Reservation and that the water rights thereby created would run to defined lands, as is generally true of water rights.

But even if Arizona were correct in her contention, the most feasible way to give full effect to the water rights created by the United States, as Arizona defines them, would be to decree to each Reservation enough water to irrigate all of the practicably irrigable acreage. It is clear that the water rights of the five Reservations in question cannot be fixed at present uses for this would defeat the basic purpose of reserving water to meet future requirements. Even if, as Arizona argues, the reservation of water was in gross for Indians and not Reservation lands, the Indians' needs may well increase in the future and these increased needs would have to be provided for. Thus, under the Arizona theory, there are two possible methods of framing the decree in this action, other than in terms of irrigable acreage.

One possibility would be to adopt an open-end decree, simply stating that each Reservation may divert at any

particular time all the water reasonably necessary for its agricultural and related uses as against those who appropriated water subsequent to its establishment. However, such a limitless claim would place all junior water rights in jeopardy of the uncertain and the unknowable. Financing of irrigation projects would be severely hampered if investors were faced with the possibility that expanding needs on an Indian Reservation might result in a reduction of the project's water supply. Moreover, it would not give the United States any certainty as to the extent of its reserved rights, which would undoubtedly hamper the United States in developing them. Since, under the Arizona theory, United States water rights vary with changes in Indian population, the planning of works to serve future needs would be difficult because the United States could never know whether sufficient water to operate the works economically would be legally available.

The other possibility, which would avoid the serious disadvantage of creating uncertainty as to the extent of the reserved rights, would be to predict the ultimate needs of each Reservation and to decree that much water for its future uses. The shortcoming of this solution, however, lies in the difficulty of predicting the future needs of Indian Reservations. Failure to foresee expanding requirements would result in a forfeiture of the Indians' water rights and would stultify development of the Reservations. Whether it is ever possible accurately to predict the future needs of an Indian Reservation, it is clearly not possible in this case where the attention of the parties has been directed to a great many complex and important issues quite apart from those relating to the Indians. Whatever might be possible in a case involving solely the issue of the reserved rights of a

single Indian Reservation,[8] it would not be possible to predict future Reservation needs in this litigation.

Therefore, the most feasible decree that could be adopted in this case, even accepting Arizona's contention, would be to establish a water right for each of the five Reservations in the amount of water necessary to irrigate all of the practicably irrigable acreage on the Reservation and to satisfy related stock and domestic uses. This will preserve the full extent of the water rights created by the United States and will establish water rights of fixed magnitude and priority so as to provide certainty for both the United States and non-Indian users.

The amount of water reserved for the five Reservations, and the water rights created thereby, are measured by the water needed for agricultural, stock and related domestic purposes. The reservations of water were made for the purpose of enabling the Indians to develop a viable agricultural economy; other uses, such as those for industry, which might consume substantially more water than agricultural uses, were not contemplated at the time the Reservations were created. Indeed, the United States asks only for enough water to satisfy future agricultural and related uses. This does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agricultural and related uses. The question of change in the character of use is not before me. I hold only that the amount of water reserved, and hence the magnitude of the water rights created, is determined by agricultural and related requirements, since when the water was reserved that was the purpose of the reservation.

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[8]Even in such cases, courts have not attempted to bind the Indians on the basis of a prediction as to future needs. See Conrad Investment Co. v. United States, 161 Fed. 829 (9th Cir. 1908).

The water rights established for the benefit of the five Indian Reservations and enforced in the recommended decree are similar in many respects to the ordinary water right recognized under the law of many western states: They are of fixed magnitude and priority and are appurtenant to defined lands. They may be utilized regardless of the character of the particular user. Thus Congress has provided for the leasing of certain Reservation lands to non-Indians,[6] and these lessees may exercise the water rights appurtenant to the leased lands. *Skeem* v. *United States*, 273 Fed. 93, 96 (9th Cir. 1921). The measurement used in defining the magnitude of the water rights is the amount of water necessary for agricultural and related purposes because this was the initial purpose of the reservations, but the decree establishes a property right which the United States may utilize or dispose of for the benefit of the Indians as the relevant law may allow. See *United States* v. *Powers*, 305 U. S. 527 (1939).

[6]See 26 Stat. 794 (1891), 31 Stat. 229 (1900), 39 Stat. 128 (1916), 41 Stat. 1232 (1921) and, the general leasing statute presently in force, 69 Stat. 539 (1955), 25 U. S. C. § 415 (Supp. 1959), 25 U. S. C. §§ 415a-d (1958).

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